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In The

Supreme Court of the United States

October Term, 1989

AMERICAL TRANSIT CORP., et al.,

Petitioners,

vs.

RENE APONTE CARATINI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a civil litigant's right to due process is violated when summary judgment is entered based on clearly inadmissible evidence and damages are assessed on the basis of a cause of action not pleaded in the complaint or litigated by the parties?

2. Whether a civil litigant's right to due process is violated when no intermediate appellate review or final appellate review as of right on the merits is available following entry of a summary judgment imposing liability on the basis of clearly inadmissible evidence for a cause of action not pleaded or litigated in the trial court?

STATEMENT OF PARTIES

Petitioners are American Transit Corp., a Missouri corporation; Empire Life Insurance Company, a Delaware corporation; Posadas de Puerto Rico Associates, a Texas partnership; Milton Koffman; and Barbara Koffman, all of whom were defendants-appellants in the case below.

American Transit Corp. is a wholly owned subsidiary of Chromalloy American Corporation, a Delaware corporation ("Chromalloy"); Chromalloy is a wholly owned subsidiary of Sequa Corporation, a Delaware corporation ("Sequa"). Non-wholly owned subsidiaries of Sequa are Applied Data Technology, a California corporation; Janus Systems, Inc., a Delaware corporation, and RFD, Inc., a Virginia corporation. Sequa and Chromalloy have other subsidiaries but all are wholly owned by either Sequa or Chromalloy.

Empire Life Insurance Company is a wholly owned subsidiary of Public Loan Company, Inc., a Nevada corporation.

In addition, Compania de Fomento de Turismo de Puerto Rico was defendant-appellant below but is not a Petitioner herein.

Respondent is Rene Aponte Caratini, who was plaintiff-appellee below.

Enrique Campos del Toro was plaintiff below at an earlier stage of the litigation but did not participate in the proceedings of the Supreme Court of Puerto Rico for which a writ of certiorari is sought herein, nor is he a Petitioner or Respondent herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

American Transit Corp. ("ATC"), Empire Life Insurance Company, Posadas de Puerto Rico Associates, Milton Koffman, and Barbara Koffman (hereinafter collectively referred to as "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Puerto Rico in this case.

OPINIONS BELOW

The Resolution of the Special Division of the Supreme Court of Puerto Rico denying Petitioners' second motion for reconsideration, entered May 3, 1989, is not reported; an official English translation is reproduced

as Appendix A to this Petition. An official English translation of the Special Division's unreported March 31, 1989 Resolution denying Petitioners' first motion for reconsideration is reproduced as Appendix B to this Petition. An official English translation of the Special Division's unreported February 23, 1989 Resolution denying Petitioners' petition for review and certiorari is reproduced as Appendix C to this Petition. An official English translation of the Supreme Court of Puerto Rico's unreported February 23, 1989 Order appointing the Special Division is reproduced as Appendix D to this Petition.

In these Supreme Court of Puerto Rico original proceedings, Petitioners sought writs of certiorari and review of a partial summary judgment entered by the Superior Court of Puerto Rico (San Juan Part) on that Court's June 30, 1988 "Resolution, Findings of Fact, Conclusions of Law, and Judgment", which is unreported. An official English translation of this Superior Court Order is reproduced as Appendix E to this Petition.

JURISDICTION

The Supreme Court of Puerto Rico Special Division's summary order denying reconsideration of its prior summary orders denying Petitioners' petition for review and certiorari was entered May 3, 1989.

The Court has jurisdiction to review the decision of the Supreme Court of Puerto Rico pursuant to 28 U.S.C. § 1258(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

U.S. Const. amend. XIV, § 1.

> The Supreme Court, any of its divisions, or any of its Justices may hear in the first instance petitions for habeas corpus and any other causes and proceedings as determined by law. It shall also review, as hereinafter set out, judgments and decisions of the Court of first instance, and cases on appeal or review pending before the Superior Court . . .

P.R. Laws Ann. tit. 4, § 35(a) (1983).

> (b) Any other final judgment of the Superior Court may be reviewed at the request of the aggrieved party by the Supreme Court through a writ of review to be issued at its discretion . . .
>
> (f) any resolution rendered by the Superior Court may be reviewed by the Supreme Court through certiorari to be issued at its discretion and not otherwise.

P.R. Laws Ann. tit. 4, § 37 (1983).

> The Supreme Court shall be the Court of last resort in Puerto Rico, and shall be composed of a Chief Justice and six Associate Justices. The number of Justices may be changed only by law upon request of the Supreme Court. While there is no vacancy in addition to the existing one, the Court shall continue sitting as at present constituted.
>
> The Supreme Court shall sit, in accordance with the rules adopted by it, as a full Court, or in divisions composed of not less than three (3) Justices. No law shall be held unconstitutional unless by a majority of the total number of Justices composing the Court in

accordance with the Constitution of the Commonwealth or with law.

P.R. Laws Ann. tit. 4, § 31 (1983).

36.3 Motion and proceedings

The [summary judgment] motion shall be served upon the adverse party at least ten (10) days before the time fixed for the day of the hearing. The adverse party prior to the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions offered, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on any one issue between the parties which can be separated from the remaining issues. Such judgment may be rendered for or against either party to the action.

P.R. Laws Ann. tit. 32, App. III Rule 36.3 (1983).

36.5 Form of affidavits; further testimony

Affidavits supporting and opposing the motion shall be made on personal knowledge. They shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . .

P.R. Laws Ann. tit. 32, App. III Rule 36.5 (1983).

STATEMENT OF THE CASE

This litigation was instituted in 1977 in the Superior Court of Puerto Rico (San Juan Part) ("Superior Court")

by Respondent Rene Aponte Caratini ("Aponte") following a dispute between Aponte and Petitioners concerning transactions entered into between them beginning in 1973.

Aponte had successfully bid on a hotel property at a prior foreclosure sale, the terms of which required him to raise $7,000,000 to close the sale before January 5, 1973 or loose his $500,000 deposit. Aponte needed the participation of other investors to raise the $7,000,000 and initiated negotiations with ATC and the other petitioners. Following negotiations, a transaction was structured whereby ATC and the other investors paid a total of $7,000,000 for the hotel property financed by a first mortgage for that amount held by Empire Life Insurance Company ("Empire"), one of the Petitioners herein, and participated in by an affiliate of ATC.

A second mortgage in the amount of $500,000, representing the bid deposit initially made by Aponte's company at a 1972 foreclosure sale, was assigned to an Aponte creditor, Enrique Campos del Toro ("Campos de Toro"), who is no longer involved in the litigation. Aponte received a third mortgage of $1.5 million and a fourth mortgage of $500,000 representing, respectively, money lost on previous bids for the hotel and funds invested in the hotel.

All of the mortgages, as well as the contract (the "Memorandum of Understanding") between the parties made clear that *none of the mortgages, including Aponte's, could be satisfied against any personal assets of any party and could only be satisfied against the property of the hotel.* The Memorandum of Understanding also specified that ATC

would have an option to purchase the hotel within 2-1/2 years, in which case Aponte would have a 40% ownership share of the property. Alternatively, if ATC did not exercise this option, Aponte would have an option to purchase for the sum of $7,040,000 plus the value of all capital improvements made at the hotel by ATC.

During 1973-1975, an affiliate of ATC operated the hotel and spent several million dollars in capital improvements. Nevertheless, the hotel lost substantial sums of money and it became necessary to reduce those losses. In April, 1975 ATC notified Aponte that ATC would not exercise its option to purchase the hotel and that Aponte could purchase the hotel pursuant to his option for $10,091,659 plus accrued interest on that part of the amount representing capital expenditures, in accordance with the Memorandum of Understanding. Aponte never exercised this option; nor did he accept a subsequent offer to buy the hotel for only $7,000,000 if he could close the sale before June 30, 1975 and make a deposit on the price, although he did initially send ATC a telegram saying he wanted to purchase the hotel for $7,000,000 (without indicating when he could close on such a sale or produce any earnest money) and eventually asked for an additional six months to raise the purchase price.

Since waiting until December, 1975 would have made it impossible to open the hotel for the winter season (resulting in further substantial losses), ATC and the other owners did not accept this proposal and permitted Empire to foreclose the first mortgage in 1976 after all the mortgages matured. In the interim the hotel was leased to a partnership named Posadas de Puerto Rico Associates, a Petitioner herein ("Posadas"), which operated the hotel

until 1984. After Empire Life foreclosed its first mortgage it sold the hotel to Posadas in 1978. In 1975 Aponte was offered an equity participation in the company organized by Posadas to acquire the hotel, but he declined to participate.

This litigation was instituted in February, 1977 by Aponte to foreclose his third and fourth mortgages (Case No. 77-712).[1] Campos del Toro also filed a suit later in 1977 against all of the other parties to the transaction (Case No. 77-6840), which was consolidated with No. 77-712. Aponte had also previously intervened as a party in the judicial foreclosure action whereby Empire had foreclosed on its first mortgage, claiming that Empire's foreclosure was improper (Case No. 76-67). Aponte never alleged any fraud on the part of ATC (or any other defendant) in No. 76-67, although he could have done so. A final judgment was entered in 76-67 against Aponte. In cases 77-712 and 77-6840 Aponte did not allege fraud. He only sought to enforce his mortgages and collect his mortgage notes. After the cases were consolidated he obtained an in personam Superior Court judgment for the $2 million total of his mortgage notes, plus interest.

That decision, however, was reversed by the Supreme Court of Puerto Rico in *Campos del Toro v. American Transit Corp.*, 113 P.R. Dec. 337 (1982). The Puerto Rico Supreme Court clearly ruled that the parties' agreement to limit liability under the mortgages – reflected in the mortgages themselves, as well as the Memorandum of Understanding – was valid, and therefore Aponte had no right to recover against ATC or the other defendants under his mortgage notes:

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[1] All case numbers in this paragraph refer to cases filed in the Superior Court.

> The agreement to limit liability accepted by both appellants and appellee Aponte Caratini, both as Empire Life Insurance Co.'s mortgagor and as Koffman and American Transit Corp.'s mortgagee – is not contrary to law. At the time the agreement was signed . . . it was legal . . .
>
> [F]or the second mortgage [i.e., Aponte's], swept out of the registry as a result of the judicial sale of a preferential mortgage [i.e., the first mortgage held by Empire], *it is completely impossible to exercise a personal action* . . . the extinguishment of the mortgage resulting from the sale of the encumbered thing, carried out as a result of the foreclosure of mortgage, also causes the extinguishment of the corresponding personal debt, even if the total amount of the secured obligation has not been covered.

[App. 55-6] (emphasis added). An official English translation of the Supreme Court of Puerto Rico's decision in *Campos del Toro v. American Transit Corp.* is reproduced as Appendix F to this Petition.

Despite the apparent *res judicata* effect of this Supreme Court decision, Aponte filed an "Amended Complaint" against ATC, Empire, and the other investors on December 21, 1984. In the Amended Complaint (an English translation of which is reproduced as Appendix G to this petition), Aponte sought breach of contract damages arising from the defendants'[2] alleged breach of

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[2] Because the original suit was filed by Campos del Toro against Aponte, ATC, and the other investors, Aponte's claim against ATC and the other parties is actually a cross-claim, or, in Puerto Rican legal terminology, a "complaint against co-parties." For the sake of clarity, this Petition will refer to Aponte's pleading as an "Amended Complaint" and to ATC and the other opposing parties (some of whom are Petitioners herein) as "defendants."

their contract to sell the hotel to Aponte. As an element of these damages, Aponte sought from the defendants the amount of his mortgage notes, even though the Supreme Court had already ruled that he could not recover on those notes against ATC or any other defendant because the limitation of liability clause was valid. Aponte did not plead a cause of action for fraud and, indeed, the word "fraud" does not even appear in his Amended Complaint. Furthermore, none of the classic elements of fraud, such as misrepresentation of fact, scienter and reliance, are alleged. *See* Appendix G.

Both sides submitted cross-motions for partial summary judgment, which the Superior Court ruled on its June 30, 1988 Order. An English translation of Aponte's cross-motion is reproduced as Appendix H to this Petition. No evidentiary hearing was conducted, although the Superior Court heard oral arguments on the cross-motions. Because fraud was not pleaded, the parties did not submit affidavits on that issue or otherwise litigate it; the only evidence submitted to the Superior Court was copies of the various contracts among the parties (including the Memorandum of Understanding, the mortgages and the notes, and the agreement to create a new company to operate the hotel after foreclosure of the mortgages), and affidavits related to Aponte's contract claim. Aponte submitted an affidavit, reproduced as Appendix I to this Petition, which sets forth conclusory and hearsay statements clearly not admissible in evidence. Petitioners submitted a competent and detailed affidavit, reproduced as Appendix J to this Petition, which rebuts the conclusory statements in Aponte's affidavit.

As with his Amended Complaint, Aponte's cross-motion for partial summary judgment in the Superior Court was devoid of any reference to fraud and sought only breach of contract relief. Indeed, Aponte's cross-motion sought only a determination that Petitioners were liable for breaching the option agreement contained in the Memorandum of Understanding to sell the hotel to him, with the amount of damages resulting from such breach to be determined subsequently at a hearing. *See* Appendix H ¶ 10 [App. 69-70] (asking court to declare that Aponte was "illegally deprived of his rights under the Memorandum of Understanding . . . and that therefore his right to compensation for the damages suffered as a result of such actions should be declared . . . and, in due time, a hearing should be scheduled to determine the sums that . . . Aponte . . . should be compensated, as well as the other remedies that he should be granted"). Despite the fact that Aponte did not plead fraud and the issue was therefore not litigated, the Superior Court's June 30, 1988 Order awarded him $2 million in unrequested damages for fraud (the face amount of the notes) plus interest. Appendix E, § IV ¶ 2 [App. 42].

The June 30, 1988 Order is not a final judgment since further proceedings are contemplated in that Order. *See* Appendix E, § IV ¶¶ 2(c), 4 [App. 42-3] ("final adjudication of this case" will occur after subsequent proceedings). The case is in fact continuing in the Superior Court with respect to Aponte's breach of contract claim. While the case continued in Superior Court, Petitioners sought appellate review of the purported interlocutory award of fraud damages. There is no intermediate appellate review as of right in Puerto Rico, and all review to the court of

last (and only appellate) resort, the Supreme Court of Puerto Rico, is discretionary. P.R. Laws Ann. tit. 4 §§ 35, 37 (1983).

Petitioners timely filed a petition in the Supreme Court of Puerto Rico seeking writs of review and certiorari. Petitioners' constitutional arguments were raised in their filings with that Court. The Supreme Court of Puerto Rico normally consists of seven judges, but one judge of that court disqualified himself without explanation from considering Petitioners' petition, and three other judges also did not participate in consideration of the petition, without any further explanation for their refusal. A Special Division consisting of only three judges of the Supreme Court of Puerto Rico was appointed to consider the petition for review and certiorari, as authorized by P.R. Laws Ann. tit. 4, § 31, App. I-A Rule 3 (1983). The Special Division denied the Petition. *See* Appendix C, D.

The Supreme Court of Puerto Rico's order refusing to consider the petition for review and certiorari was entered in an original action seeking a writ of review or certiorari in that Court. That decision is therefore considered "final" for purposes of review in this Court, despite the fact that the June 30, 1988 Superior Court Order is not a final order and ATC can still attempt to obtain discretionary review of that Order in subsequent proceedings as the case continues in the Superior and Supreme Courts in Puerto Rico. *Board of Education v. Superior Court*, 448 U.S. 1343, 1345-46 (1980) (Rehnquist, J., in chambers) (judgment terminating original proceeding in state appellate court seeking review of order entered in ongoing trial court action is "final" for purposes of Supreme Court

review); *see, e.g. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-91 (1980) (granting certiorari from denial of original appellate action for writ of prohibition prior to final adjudication in the trial court).

Alternatively, this Court may as a matter of discretion treat the Supreme Court of Puerto Rico's decision as "final" for purposes of review here notwithstanding the interlocutory nature of the June 30, 1988 Superior Court Order and the fact that "there are further proceedings in the lower . . . [Commonwealth] courts yet to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). The due process issues presented here "will survive and require decision regardless of the outcome of further state court proceedings." *Id.* at 480. Thus, this case may be reviewed by the Court at this time despite the nonfinal nature of the Superior Court order.[3]

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[3] The Court may also treat this Petition as a petition for writ of mandamus to the Supreme Court of Puerto Rico pursuant to 28 U.S.C. § 1651 directing that Court to consider on the merits ATC's petition to that Court. Specifically, the Supreme Court of Puerto Rico can be directed to consider the issues of the finality of the June 30, 1988 Superior Court Order and the *res judicata* effect of its prior *Campos del Toro* decision. Such an order would be "in aid of" this Court's jurisdiction, 28 U.S.C. § 1651(a), since it would assist this Court in determining the finality of the underlying judgment for purposes of review in this Court pursuant to 28 U.S.C. § 1258. Additionally, such an order would prevent multiplicity of proceedings, thereby securing a just, speedy and more efficient determination of this action.

REASONS FOR ISSUANCE OF THE WRIT

A. The Writ Should Issue Because the Question of What Minimum Standards Are Required by the Due Process Clause with Respect to Summary Civil Litigation Is of Substantial Importance

This Court has long recognized as a fundamental principle that the Due Process Clause requires certain minimum procedures and safeguards in the context of civil litigation, particularly when summary proceedings are conducted. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, ___, 108 S.Ct. 896, 899 (1988). While this and other Courts uniformly state that due process mandates such standards, the nature of these required protections is frequently less than fully articulated or couched in such broad terminology as the need to assure "elementary and fundamental" rights. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

This case, in which partial summary judgment was entered against Petitioners on a cause of action not pleaded against them and therefore not litigated in the trial court, offers this Court the opportunity not only to correct a manifest injustice, but to clarify for the benefit of all litigants what minimum procedures the Due Process Clause requires before liability may be imposed for claims and issues not fully litigated by the parties. This Court has noted "the cryptic and abstract" nature of the "words of the Due Process Clause[.]" *Mullane*, 339 U.S. at 313. Granting the writ here will permit the Court to clarify how as a practical matter these "abstract words" apply in the civil summary judgment context, and "what

process is due" in such proceedings. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The general principles of *Morrissey*, *Mullane* and *Boddie v. Connecticut*, 401 U.S. 371 (1971), and its progeny remain the touchstones of this Court's analysis of the requirements of due process in civil litigation. *See*, e.g., *Peralta*, 485 U.S. at ___, 108 S.Ct. at 899; *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (plurality opinion) (1987). Under these principles, summary judicial procedures, like other proceedings, are violative of due process rights when a litigant is deprived of a "*meaningful* opportunity to be heard," *Boddie*, 401 U.S. at 377 (emphasis added). While the precise nature of the necessary hearing "can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings[,]" *Boddie*, 401 U.S. at 379, a "root requirement" of due process is the opportunity for a hearing prior to adjudication. *Id.* at 380.

Closely related to this principle is the requirement that notice be afforded in a manner that has the actual effect of informing the defendant of the nature of the claim to be adjudicated against him. Notice that may generally suffice is violative of due process if it fails to actually inform a specific defendant of the claims against him or her in the particular circumstances of his or her case. *Id.* This principle is so important that summary judgment without proper notice may not be entered even if the defendant has no meritorious substantive defense to the claim. *Peralta*, 485 U.S. at ___, 108 S.Ct. at 900. Thus, the Superior Court's action in the proceedings below cannot be defended on grounds that Petitioners would eventually not prevail on the merits of the fraud claim;

Petitioners are entitled, at the very least, to fair notice of the nature of the claim against them. *Id.*

In sum, the Due Process Clause is violated when as a practical matter summary procedures have had the actual effect of denying a civil litigant a meaningful opportunity to contest the claim asserted against him or her. *Boddie*, 401 U.S. at 380-81. *See also* Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 Notre Dame L.Rev. 770, 771-72 (1988) (Due Process Clause imposes constraints on summary adjudications). Granting the writ here will permit the Court to specify how these principles apply in the widely used summary judgment process.

At a minimum, these standards require that any summary relief granted conform to the claims pleaded and therefore actually litigated. The principle that a civil litigant who is assessed damages for claims not pleaded has been deprived of notice and an opportunity to be heard is a venerable one. As this Court observed a century ago,

> This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted . . .
>
> [T]he rule is universal that where . . . [the defendant] appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines the matters which by the pleadings are put in issue.

Reynolds v. Stockton, 140 U.S. 254, 265-66 (1891). A long line of subsequent cases has reaffirmed this fundamental notion that due process requires relief to conform to the cause of action pleaded. *E.g., Standard Oil Co. v. Missouri*,

224 U.S. 270, 281-82 (1912); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 581 (1971) ("A decree must relate specifically and exclusively to the pleadings and proof. If not so related, the provision, because of its vagueness, will jeopardize the exercise of protected freedoms"); *Motta v. Samuel Weiser, Inc.*, 768 F.2d 481, 486 (1st Cir.), *cert. denied*, 474 U.S. 1033 (1985) (recognizing that due process requires relief to conform to pleadings); *First National Bank of Hollywood v. American Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2nd Cir.), *cert. denied*, 429 U.S. 858 (1976) (same).

Granting the writ would provide the Court the opportunity to specify what this principle requires in the particular context of summary judgment, a procedural device of increasing importance which is favored by the courts as an expeditious means of resolving disputes without undue waste of judicial resources. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). As the Court's discussion in *Celotex* makes clear, summary judgment is not a "disfavored procedural shortcut" only so long as all affected persons have a meaningful opportunity to demonstrate the existence of claims and defenses "that are adequately based in fact" and therefore must be tried to a jury. *Celotex*, 477 U.S. at 327. In light of the increasing prevalence of summary adjudications, the question of what minimum standards are required by the Due Process Clause is of obvious general and substantial importance.

This issue is squarely presented in this Petition because the record in the proceedings below clearly indicates that damages for fraud were awarded by the Superior Court notwithstanding the complete absence of a

pleaded fraud cause of action in the Amended Complaint.

The Superior Court decided to pierce the corporate veil and impose personal liability on Petitioners in order not to "condone fraud," Superior Court June 30, 1988 Order (Appendix E) § III ¶ 1 [App. 29], and premised its finding of liability on the "fraudulent deprivation" supposedly worked by Petitioners "to *fraudulently* deprive Aponte of his property", *Id.* ¶ 6 [App. 32] (emphasis added). The Superior Court heard no evidence on fraud and ruled that this finding of fraud "was established [solely] in writing [i.e., the contract] among all the [Petitioners]." *Id.* The Superior Court's judgment is thus expressly based on an adjudication that Aponte "was *fraudulently* deprived of his right to collect the mortgages," *Id.* (emphasis added), and the decretal paragraphs actually awarding damages expressly describe them as awards for damages resulting from Petitioners' "fraudulently depriving" Aponte of the funds. *Id.* § IV ¶¶ 2(a)-(b) [App. 42].

In contrast, Aponte's Amended Complaint sought only damages for breach of the contractual Memorandum of Understanding, *Id.* (Appendix G) ¶ 7 [App. 61] ("In violation to what was agreed in the 'Memorandum of Understanding' . . . [Petitioners] breached same in the following manner . . . "); ¶ 10 [App. 63] ("[Petitioners] should be ordered to comply with the provisions of the 'Memorandum of Understanding' . . . "). Petitioners understandably did not litigate any issue related to fraud in response to these breach of contract pleadings; nevertheless the Superior Court found that Petitioners

"fraudulently deprived" Aponte of $2 million plus interest.

Similarly, Petitioners' due process rights to notice and an opportunity to litigate the issues were denied by the Superior Court's imposition of liability for the mortgage notes on a theory of "piercing the corporate veil." Aponte never requested such relief in his Amended Complaint or any other pleading, and the Supreme Court of Puerto Rico's prior decision in *Campos del Toro* expressly ruled that Petitioners could not be personally liable on the mortgage notes because the nonrecourse clauses were valid. *Compare* Amended Complaint (Appendix G) (no request to pierce corporate veil) *with* Superior Court June 30, 1988 Order (Appendix E) § III ¶ 1 [App. 26-9] (court will pierce the corporate veil because of Petitioner's fraud).

It can not even be argued that the pleadings were amended by Aponte's affidavit submitted in support of his cross-motion for partial summary judgment (which would be a novel proposition), because the Superior Court lacked authority to grant summary judgment based on such an affidavit. As previously noted, the statements in Aponte's affidavit were conclusory in nature and not admissible in evidence. Aponte's affidavit testimony was not credible, contrary to logic and reason and based solely on speculation and conjecture.

The affidavit is almost entirely hearsay and devoid of any affirmative indication that Aponte was competent to testify as to the matters discussed therein. Furthermore, the affidavit, like Aponte's motion for partial summary judgment, did not in fact frame an issue of fraud or

piercing the corporate veil upon which the Superior Court could rule. Thus, under Puerto Rico law, the affidavit was not admissible and the Superior Court should not have considered it in ruling on the cross-motions. P.R. Laws Ann. tit. 32, App. III Rule 36.5 (1983). The inadmissibility of such affidavits is widely recognized in the Federal Rules of Civil Procedure and other State rules. *E.g., Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988).

Petitioners' due process rights were thus further violated by the Superior Court's adjudication against them based on inadmissible evidence. The evidentiary validity of this affidavit was of course duly challenged by Petitioners in both the Superior Court and the Supreme Court of Puerto Rico to no avail. Petitioners also submitted a competent affidavit specifically rebutting Aponte's claims, *see* Appendix J; the Superior Court virtually ignored this affidavit in its June 30, 1988 Order. This underscores the necessity of prompt redress by this Court.

The summary procedures involved in the proceedings below implicate not only the "notice" required by due process at the pleading stage, but also squarely present the question of what "opportunity to be heard" must be afforded in the context of summary proceedings. As this Court observed long ago, "notice is only for the purpose of affording the party an opportunity of being heard"; mere notice without a *meaningful* opportunity to litigate the noticed claim is repugnant to due process. *Windsor v. McVeigh*, 93 U.S. 274, ___, 23 L. Ed. 914, 916 (1876). *See also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is

the opportunity to be heard at a meaningful time in a meaningful manner") (citation omitted). Thus, granting summary judgment ostensibly for reasons of judicial economy when the opposing party has been afforded no meaningful opportunity to litigate the claim against him "denie[s] . . . [the] due process right to be heard." *Management Investors v. United Mine Workers*, 610 F.2d 384, 390 (6th Cir. 1979).

In the proceedings below, no discovery was taken by either party on the (unpleaded) fraud issue, although the relevant summary judgment rule adheres to the universal procedure that contemplates consideration of such a motion only after discovery. *See* P.R. Laws Ann. tit. 32, App. III Rule 36.3 (1983). Petitioners were never properly notified that they could be adjudged liable for fraud or for personal liability on a "piercing the corporate veil" theory, and therefore never had an opportunity to litigate those issues or be heard on the matter during the summary proceedings conducted without an evidentiary hearing.

It has long been recognized in Puerto Rico and elsewhere that allegations of fraud must be pleaded with particularity and are not amenable to summary adjudication. *E.g., Garcia Lopez v. Mendez Garcia*, 88 P.R.R. 352, 368-69 (1963) (claims involving deceit, fraud or any other kind of mental state or subjective factor should not be summarily heard "because in such cases the court could hardly obtain the whole truth on the facts through affidavits or depositions"). Particularly when no allegations of "fraud" were made by Aponte in the proceedings below, due process must require more particularity and

an opportunity to litigate than was afforded Petitioners in the summary proceedings below.

Thus, Petitioners were deprived not only of notice but of a meaningful opportunity to be heard on the issues subsequently adjudged against them. *Cf. Celotex Corp. v. Catrett*, 477 U.S. at 322 ("Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case") (emphasis added). At a minimum, due process would appear to require that liability for fraud may not be imposed where that cause of action is neither specifically pleaded nor addressed in the discovery process or in the summary judgment pleadings.

B. The Writ Should Issue So That This Court Can Determine What Minimum Standards Are Required by the Due Process Clause in Summary Appellate Review

This Petition presents a related issue of similar general significance and importance: the extent to which the Due Process Clause is implicated in the civil appellate review process. In this case, pursuant to Puerto Rican statutory law, no intermediate appellate review as of right was available of the Superior Court's partial summary judgment, and the only appellate tribunal (and court of last resort), the Supreme Court of Puerto Rico, grants only discretionary review of civil appeals through either the review or certiorari process. P.R. Laws Ann. tit. 4, §§ 35, 37(b), 37(f) (1983). The Supreme Court of Puerto Rico may even summarily refuse to consider as a whole whether to provide full appellate review by sitting in

Special Division, as was done in this case. Thus, two of Supreme Court of Puerto Rico's seven justices (*i.e.* a majority of the three-member Special Division) may effectively nullify full review of any civil appeal, as occurred here.

This Court's decisions have made clear as a general matter that the Due Process Clause is implicated when a State (or, as in this case, the Commonwealth of Puerto Rico) decides to permit civil appeals.[4] Although a State or Commonwealth is not required to permit appeals, the Due Process Clause does require appellate review where a litigant has been deprived of due process "in the tribunal of first instance." *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80 (1930). The Court has also noted that once a right of appeal has been created, the state must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (criminal appeal). Thus, as in the case of the applicability of the Due Process Clause to civil litigation in the trial court, this Court has made clear that due process is implicated during appellate review, but has discussed this principle largely in general terms. *E.g. Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (Brennan, J. concurring) (litigant "cannot, consistent with due process and equal protection, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal").

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[4] The Due Process Clause and other constitutional provisions are applicable in the Commonwealth of Puerto Rico in the same manner as they apply to the States. *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7 (1982).

This case, in which no "full and fair trial on the merits . . . [was] provided," *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) and "due process . . . [was not] accorded in the tribunal of first instance[,]" *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. at 80, squarely presents the issue of what appellate procedures a State or Commonwealth is obligated by the Due Process Clause to provide for review of summary adjudications. The practical effect of Puerto Rico's lack of any intermediate appellate review and absence of any right to review on the merits by the court of last resort has the practical effect of denying "an adjudication on the merits" to litigants such as Petitioners. *Evitts* at 387. As the Court noted in *Bryant*, due process is not offended by discretionary appeals in the court of last resort only so long as there is an "opportunity . . . to contest all constitutional and other questions fully . . . in the [intermediate] court of appeals[.]" 281 U.S. at 80. No such opportunity was available to Petitioners here.

Petitioners were not afforded the opportunity to litigate the fraud claim in Superior Court and were deprived of any notice that such damages could be assessed against them. They were subsequently deprived of any appellate review of this action, except for the decision of only three members of the sole appellate court, who summarily declined to consider the merits of Petitioners' claims. At a minimum, due process would appear to require that Petitioners have the opportunity to litigate these issues fully in some tribunal, be it the trial court, the (in this case nonexistent) intermediate appellate court, or in the court of last resort.

While certain aspects of the Puerto Rican court system may be unique to that Commonwealth, the general question of what appellate procedures are required to review summary adjudications is of widespread importance in light of burgeoning appellate caseloads and the increasing use of summary procedures at the appellate level. *See McDonough Power Equipment, Inc. v Greenwood,* 464 U.S. 548, 553 (1984) (judicial system faces "constantly increasing caseload"); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 748 n.1 (1981) (Burger, C.J., dissenting) (number of federal appeals rose 495% from 1960 to 1980 and caseload per panel increased 206% during same period)).

CONCLUSION

The Due Process Clause has been construed many times in different contexts, but the application of that Clause to the summary civil trial and appellate process is genuinely a matter of general importance that has rarely been discussed by this Court. This Court has not hesitated to entertain appeals or grant writs in order to correct the fundamental unfairness that occurs when summary judgments are entered without the meaningful notice and opportunity for hearing required by the Due Process Clause. *E.g., Peralta v. Heights Medical Center,* 485 U.S. at ___, 108 S. Ct. at 898 (reversing Texas summary judgment for lack of proper notice to defendant). This case is of even more general interest because of the widespread use of the type of summary adjudications at issue here.

When trial and appellate procedures combine effectively to deny fair notice and a meaningful opportunity to

be heard, resulting in imposition of millions of dollars in liability, review by the Court is merited not only to prevent injustice in this particular case, but to clarify issues frequently alluded to but seldom fully articulated in this Court's decisions. The questions presented here regarding the applicability of the Due Process Clause to summary judicial procedures at the trial and appellate level are for these reasons worthy of full review by this Court.

For the foregoing reasons, Petitioners respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

Enrique Campos del Toro,

Plaintiff

v. No. RE-88-542 Review

Tourism Development Company of Puerto Rico,

Co-party defendant

René Aponte Caratini,

Co-party defendant
Plaintiff-appellee

American Transit Corp., etc.,

Co-party defendants
Defendants-appellants

Special Division composed of Mr. Justice Ortiz, acting as Chief Judge of Division, and Mrs. Justice Naveira de Rodón, and Mr. Justice Alonso Alonso.

RESOLUTION

San Juan, Puerto Rico, May 3, 1989

We hereby deny the second motion for reconsideration. Abide by the same.

It was so agreed by the Court and certified by the Chief Clerk.

(SEAL) (Sgd) Francisco R. Agrait Lladó
Chief Clerk

APPENDIX B

IN THE SUPREME COURT OF PUERTO RICO

Enrique Campos del Toro,

Plaintiff

v. RE-88-542

Tourism Development Company of Puerto Rico,

Co-party defendant

Pené Aponte Caratini,

Co-party defendant
Plaintiff-appellee

American Transit Corporation, Milton Koffman, Bárbara Koffman, Empire Life Insurance Company, Posadas de Puerto Rico Associates, Inc., Posadas de Puerto Rico, S.A., Inc.,

Co-party defendants
Defendants-appellants

Special Division composed of Mr. Justice Ortiz, acting as Chief Judge of Division, and Mrs. Justice Naveira de Rodón, and Mr. Justice Alonso Alonso.

RESOLUTION

San Juan, Puerto Rico, March 31, 1989

Having the Court in full received and considered the motion seeking the full Court's intervention, the Justices who took no part in this case reiterate their position.

We hereby deny the motion for reconsideration.

It was so agreed by the Court and certified by the Chief Clerk.

(SEAL)

(Sgd) Francisco R. Agrait Lladó
Chief Clerk

APPENDIX C

IN THE SUPREME COURT OF PUERTO RICO

Enrique Campos del Toro,

Plaintiff

v. RE-88-542 Review

Tourism Development Company of Puerto Rico,

Co-party defendant

René Aponte Caratini,

Co-party defendant
Plaintiff-appellee

American Transit Corporation, Milton Koffman, Bárbara Koffman, Empire Life Insurance Company, Posadas de Puerto Rico Associates, Inc., Posadas de Puerto Rico, S.A., Inc.,

Co-party defendants
Defendants-appellants

Special Division composed of Mr. Justice Ortiz, acting as Chief Judge of Division, and Mrs. Justice Naveira de Rodón, and Mr. Justice Alonso Alonso.

RESOLUTION

San Juan, Puerto Rico, February 23, 1989

The Petition for review and certiorari is hereby denied.

It was so agreed by the Court and certified by the Chief Clerk.

(SEAL)

(Sgd) Francisco R. Agrait Lladó
Chief Clerk

APPENDIX D

IN THE SUPREME COURT OF PUERTO RICO

COMPOSITION OF DIVISION

ORDER

San Juan, Puerto Rico, February 23, 1989

Since Mr. Justice Negrón García disqualified himself and Mr. Chief Justice Pons Núñez and Messrs. Justices Rebollo López and Hernández Denton took no part in case RE-88-542 – Campos del Toro v. Compañía de Fomento de Turismo de Puerto Rico, etc., a Special Division is created, composed of Mr. Justice Ortiz, as Chief Judge of Division, and Mrs. Justice Naveira de Rodón, and Mr. Justice Alonso Alonso to entertain in this case.

It was so ordered and signed by

/s/ Peter Ortiz
Acting Chief Justice

(SEAL)

APPENDIX E

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

ENRIQUE CAMPOS DEL TORO,	CIVIL NO. 77-6840 (808) 77-712
PLAINTIFF	
V.	RE:
AMERICAN TRANSIT CORPORATION, MILTON KOFFMAN, BARBARA KOFFMAN, EMPIRE LIFE INSURANCE CO., POSADAS DE PUERTO RICO ASSOCIATES, INC., TOURISM DEVELOPMENT COMPANY OF PUERTO RICO, AND RENE APONTE CARATINI,	COLLECTION OF MONEY, FORECLOSURE OF MORTGAGE, AND DAMAGES
DEFENDANTS	

RESOLUTION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

I. *INTRODUCTION:*

The case at bar began with a complaint brought by Enrique Campos del Toro against all the above-captioned defendants. Although said claim was settled by Enrique Campos del Toro and several of the codefendants through payment of a sum of money, there is still pending the complaint filed by René Aponte Caratini against the other codefendants. We will now address the motions seeking summary judgment brought by the defendants and by defendants against the co-parties appearing below under

the letter A, as well as the one filed by the defendant and plaintiff against co-party René Aponte Caratini. Pending adjudication are the following motions:

A. Motion of June 1, 1987, seeking summary judgment, filed by American Transit Corporation, Milton Koffman, Barbara Koffman, Empire Life Insurance Company, Posadas de Puerto Rico, S.A., Inc., and Posadas de Puerto Rico Associates.

B. Opposition to Motion seeking partial summary judgment and Motion seeking partial summary judgment filed by codefendant René Aponte Caratini on September 18, 1987.

C. Answer to "Opposition to Motion seeking partial summary judgment and Opposition to "Motion seeking partial judgment," filed by the defendants against co-parties mentioned under letter A, on October 30, 1987.

D. Answer filed by René Aponte Caratini on December 30, 1987.

E. Rejoinder filed by codefendants against co-party on January 13, 1988.

Some of these motions came accompanied by extensive documentation. We shall refer to any of the above-mentioned motions by the identifying letter (A to E). There is no controversy between the parties as to the authenticity of the documents filed.

As we stated above, this case began with Enrique Campos del Toro as plaintiff. His claim was settled, and pending before our consideration is René Aponte Caratini's claim against the other codefendants. To avoid confusions we will refer to the defendant and plaintiff

against co-party Aponte Caratini as plaintiff, and to the other codefendants and defendants against co-parties as defendants.

This court set the hearing on the above motions for April 27, 1988. At said hearing plaintiff appeared in person and assisted by his counsels Nelsa López, Jenaro Marchand, and Julio Eduardo Torres. Defendants were represented by their counsel María del Carmen Taboas. Both parties presented their respective positions at length before the Court and the matter was taken under advisement. We have carefully examined the parties' motions and accompanying documents, as well as the lengthy records of these cases. We have carefully analyzed the parties' arguments during the hearing held on April 27, 1988, as well as the applicable Law. Based on an analysis of the above, the court draws the following:

II. *FINDINGS OF FACT:*

1. The claims under our consideration arise from several transactions held between a diverse group of natural and artificial persons. Within each of these groups, several natural and/or artificial persons indistinctively executed contracts and agreements, acquiring rights and mutually imposing obligations upon each other. Not all natural and/or artificial persons making up each group appeared in each of these acts or contracts. We shall list below the natural and/or artificial persons composing each of the groups. Let us see:

AMERICAN TRANSIT CORPORATION OR CHROMALLOY

a. American Transit Corporation

b. Chromalloy American Corporation

c. Helio Isla Hotel

d. Helio Hotel Corp.

e. Helio San Jerónimo Corp.

f. Waterco Industries Inc.

g. W. Stanley Walch

h. A.T. Leasing Co.

KOFFMAN GROUP

a. Milton Koffman

b. Burton Koffman

c. Barbara Koffman

d. Richard E. Koffman

e. Empire Life Insurance Co.

f. Amron Credit Corp.

g. Cenkoff, Inc.

POSADAS

a. Posadas de América Central, S.A.

b. Posadas de México S.A. de C.V.

c. Posadas de Puerto Rico Assoc., S.A.

FEE COMPANY

a. Chromalloy - 37 1/2%

b. Koffman Group - 37 1/2%

c. Posadas - 25[%]

APONTE GROUP

a. René Aponte Caratini

b. San Jerónimo Hotel Corp.

(Sometimes some documents included Enrique Campos del Toro and Margarita Ledesma as part of the Aponte group. However, they will not be included in said group in our reference to the same unless so indicated.)

This finding is based on an examination of all the documents presented by the parties on the definitions contained in the same, and on the parties' actions. The "Shareholders Agreement," for example, (see Motion B, Exh.10) includes the following definitions, among others:

1.8 "CHROMALLOY" means, collectively and jointly and severally, Chromalloy American Corporation, American Transit Corp., A.T. Leasing Co., and any other Chromalloy American Corporation subsidiary or affiliate which may be involved in the ownership, operation or financing of the Hotel.

1.1 "FEE COMPANY" means a corporation to be organized in the State of Delaware, which such corporation shall be owned in the following percentages:

Koffman Group 37 1/2%

Chromalloy 37 1/2%

Posadas 25%

1.18 "KOFFMAN GROUP" means Burton I. Koffman and Richard E. Koffman, individually, and as tenants-in-common. In addition, Burton and Richard Koffman hereby guarantee to Chromalloy and Posadas that (i) Milton and Barbara Koffman, who are nominees and two of the Equity Owners described herein, will honor and

abide by the terms of this Agreement, (ii) the present and subsequent holder of the First Mortgage as defined herein will honor and abide by the terms of this Agreement, and (iii) all members of the Koffman Family and any corporations which they control or are affiliated with, directly or indirectly, will honor and abide by the terms of this Agreement insofar as it affects any direct or indirect interest such persons or corporations may have in the ownership, operation or financing of the hotel."

2. Towards the end of 1972, the San Jerónimo Hotel Corp. was awarded the bid to purchase the San Jerónimo Hotel located in the Condado sector of San Juan, Puerto Rico. Said bid was awarded in an auction held in the Federal District Court for the District of Puerto Rico. San Jerónimo Hotel Corp. deposited $500,000.00 with the Federal Court and an additional term was given to it to deposit the total cost. This total cost was $7,500,000.00, thus the balance pending was $7,000,000.00. René Aponte Caratini owned all the shares in the San Jerónimo Hotel Corp.

3. On January 5, 1973, the San Jernimo Hotel Corp. acquired the San Jerónimo Hotel for $7,500,000.00. Since $500,000.00 had already been deposited, it paid then the $7,000,000.00 balance.

4. In order to raise the $7,000,000.00, the San Jerónimo took a $7,000,000.00 mortgage through public deed No. two of January 5, 1973, before notary Edward M. Borges. Among the clauses included in said mortgage was the following:

"TWENTY-SIXTH: *Exculpation*

The MORTGAGOR and the MORTGAGEE expressly agree that the Mortgage Notes and the Mortgage issued and delivered by the MORTGAGOR to the MORTGAGEE and received by the latter with the clear understanding and agreement that the MORTGAGOR shall not ever be personally responsible for the payment of any sum by virtue of having executed, issued and delivered the aforementioned Notes and the Mortgage which guarantees them, or by reason of any breach of any of the terms and conditions to which said Notes and the Mortgage which guarantees them are subject, the MORTGAGOR and the MORTGAGEE having agreed that the rights and obligations of the MORTGAGOR and the MORTGAGEE and of any successor or assignee or any person that by any means might have acquired any title or right to said Notes and Mortgage for any consideration or cause shall be limited to the real property object of this deed and mortgage to guarantee the aforementioned Notes; and the MORTGAGOR shall not be responsible personally for the payment of any sum to any person by virtue of having executed, issued or delivered said Notes and Mortgage." (English translation taken from *Campos del Toro v. Ame. Transit Corp.*, 113 D.P.R. 337, 339-40 (1982).) [*sic*]

5. The $7,000,000.00 loan secured through the cited mortgage was granted by Empire Life Insurance Co., that, as we have said before, is one of the companies in the Koffman group. That same day, January 5, deed No. 3 was executed before notary Edward M. Borges. Through said deed, the San Jerónimo Hotel Corp. sold the property to Milton and Barbara Koffman and the American Transit Corp. The Koffmans acquired 70% of the shares

and American Transit Corp. 30%. The sales price was $7,500,000.00. They gave a $500,000.00 promissory note to vendor and retained $7,000,000.00 to pay the mortgage as required. Said deed provided the following:

> "Two: The Purchasers are buying the Property in common as co-owners in the following percentages each:
>
> (a) Mr. Milton Koffman and his wife Barbara, seventy (70%) percent.
>
> (b) American Transit Corp., thirty (30%) percent. Accordingly, the purchase price shall be paid by each of them in the above percentages."
>
> (Underscore supplied.)

6. On that same day the parties signed a "Memorandum of Understanding" (see Motion A, Exh. 2). This Memorandum was drafted by Mr. W. Stanley Walch, executive of American Transit and Chromalloy. This document, motivated by a pressure of time, made a relation of the main economic agreements reached. The parties agreed to negotiate and execute within 60 days from the date of the Memorandum of Understanding, a definitive agreement including all facets of the economic obligations with their respective interests in the operation and ownership of the hotel. They stated further that if they failed to negotiate and execute the definitive agreement within the fixed term, the Memorandum of Understanding would constitute a contract between the parties. Since the parties did not reach a definitive agreement within the 60-day term, said Memorandum of Understanding became a contract.

7. Said agreement stated that the $500,000.00 promissory note issued pursuant to the cited deed No. 3 had

been or assigned to Enrique Campos del Toro. The same would bear interest and be subordinate to the $7,000,000.00 mortgage executed through deed No. 2 and which had been delivered to Empire Life Insurance Co. Said Memorandum of Understanding also provided for the delivery of a $1,500,000.00 note to Aponte secured by the mortgage over the hotel for a three-year term. This note would not bear interest during such term and would constitute a third mortgage. Aponte further committed himself to advance the sum of $500,000.00 to the entity designated by American Transit as lessor or hotel operator. When such sum was received the hotel owners would issue a note secured through mortgage for the sum of $500,000.00 and the same would bear interest as specified in the contract. Although Aponte's commitment was to advance said sum within the 60 days following January 5, 1973, he did not furnish said sum until August 1973, that is, approximately eight months later. The mortgage in question was for said sum.

8. Said Memorandum of Understanding contained a clause limiting the mortgage debtors' liability to the mortgaged property, similar to that indicated above (see finding of fact No. 4), that was included in deed No. 2, extending said clause's coverage to all mortgages referred to in the Memorandum of Understanding.

9. American Transit Corp. agreed to pay all the interests during the three-year period in those mortgages that would bear interest, that is, the $7,000,000.00 mortgage securing the Empire Life Insurance Corp. loan, the $500,000.00 mortgage whose promissory note would be assigned to Enrique Campos del Toro, and the $500,000.00 mortgage deposited by René Aponte Caratini. Moreover,

American Transit was committed for three years, through Helio Hotel Corp. – or one of its affiliates – to lease as tenant the hotel and would have all operation rights over the same. American Transit and Helio were authorized to determine whom they would commit to such ends. It specifically provided that the sole responsibility of American Transit and Helio, and other entities, towards the Koffman group and towards Aponte during the three-year term would be to pay the debt service charges and be responsible for all operating expenses and decisions in connection with the operation of the hotel. In this regard, American Transit agreed that the hotel would be run as a first-class establishment in a "reasonable and prudent business-like manner."

10. The $1,500,000.00 note secured through mortgage and delivered to Aponte Caratini was a refund for the sums deposited by him in previous bids or invested in the hotel. (See paragraph 16 - Sworn Statement of W. Stanley Walch, Motion A, Exh. 29.)

11. The Memorandum of Understanding granted defendant American Transit a purchase option over the hotel during the two and a half year-period following execution of said document. It also regulated the financing if American Transit should exercise its option. It provided that in such case it had to convey to Aponte Caratini 40% of the equity interest.

With regard to the purchase of the hotel the parties agreed that if American Transit did not exercise its option, Aponte would have an option to purchase the hotel for $7,040,000.00, plus all disbursements made for

refurbishing or capital improvements on the hotel, including accrued interest.

The term for the Aponte option would start to run two and a half years after date of contract, and terminate three years from that date. Said term could be extended if American Transit exercised its option and failed to close the deal. If this were the case, Aponte's option term would be extended to three and a half years after date of agreement. In either case, Aponte would have six months, after date of notice that he would exercise his option, to close the deal.

12. The agreements contained in the Memorandum of Understanding were in addition to the transactions arising from the deeds executed on that same date (see Motion A, p. 4). As a result of the different transactions and of the execution of the documents mentioned, on January 5, 1973, both the hotel's ownership and the obligation to pay the deferred payment sale was delineated in the following proportions:

a. Koffman Group - 70%

b. American Transit - 30%

13. In 1973 American Transit began operating the hotel under Helio Hotel management.

14. On April 8, 1975, American Transit sent a letter to René Aponte Caratini (see Motion A, Exh. 7). Among other things, it:

a. notified Aponte that it was not interested in exercising the option contained in the Memorandum of Understanding.

b. stated that the cost of the refurbishing and capital improvements was $2,640,207.00, plus $411,452.00 in interest, and the interest accrued from April 30, 1975 up to the closing.

c. stated that although technically Aponte had until December 31, 1975 to exercise his option, it would appreciate some preliminary indication of intent at the earliest date possible. Said informal indication would enable advance planning with respect to the ultimate disposition of the hotel property when the present mortgages matured or defaulted on or before January 4, 1976.

d. indicated that in view of continuing operating losses, American Transit could cease operating the hotel in the near future. For such reason, it stated that it was imperative that the "Equity Owners and Mortgage Holders" begin to consider alternate arrangements for the operation of the hotel following discontinuation of American Transit's operations.

15. On June 11, 1975, W. Stanley Walch, in representation of American Transit, and Burton Koffman, in representation of the Koffman group, sent a letter to René Aponte Caratini. They described the same as a general outline of the proposed terms of the refinancing needed to reopen the Helio Isla Hotel, and to develop a sufficiently attractive debt structure to interest the Posadas de Mexico in making an operating agreement with option to purchase the hotel. They proposed the creation of a new entity that would be owned by each of the two original groups, American Transit (Chromalloy) and Koffman, each holding 37 1/2% interest, and 25% by Posadas. They offered the René Aponte Caratini group a maximum 15%

participation in the hotel equity, subject to the following conditions:

a. Aponte Caratini should forego collection of his $1,500,000.00 mortgage.

b. Aponte Caratini and Enrique Campos del Toro should extend their $500,000.00 mortgages for four additional years each. Empire Life Insurance would in turn extend theirs for two additional years.

c. If the Aponte group accepted this transaction, it would agree to secure 15% of the interest on the Empire Life's first mortgage.

d. If it obtained permanent financing for the debt owed to Empire Life Insurance, financing would be sought to pay Aponte Caratini's and Campos del Toro's $500,000.00 mortgages, or these would be converted to permanent mortgages with equivalent amortization in the new mortgage.

e. Aponte Caratini's and Campos del Toro's $500,000.00 mortgages would not bear interest until sufficient income is generated. The treatment proposed for these mortgages was different from that proposed for the Empire Life Insurance mortgage, which would bear interest personally secured by the new owners in the proportion corresponding to each.

f. Chromalloy would receive 50% of any profits made by the new company to pay for its investment in the property improvements prior to any payment of interest to Aponte Caratini and Campos del Toro.

The letter also stated that the Koffman group, American Transit, and Posadas agreed with the proposal and

would enter into a more definitive agreement should the Aponte group concur likewise. They added that should Aponte fail to give his consent they would be forced to foreclose the first mortgage on the following month (that is, July 1975);[1] and dispose of the hotel at public auction, or attempt to convince Posadas to open operations without a refinancing agreement to allow them uninterrupted possession.

Finally, they indicated that they were ready to sell the hotel at that time for the face amount of the first mortgage, $7,000,000.00. They told Aponte that if he was able to obtain the funds to purchase the first mortgage, they (American Transit and the Koffman group) would be willing to move in that direction. They closed the letter saying that "Due to the crucial timing involved in this situation, we ask that you advise all parties of the avenues which you intend to pursue no later than June 30, 1975."

16. On June 30, 1975, Aponte Caratini sent the Koffman group and American Transit a letter informing them of his decision to purchase the hotel for the $7,000,000.00 indicated in the June 11, 1975 letter. He requested their immediate response to coordinate all the details and set a reasonable date for closing.

17. On July 1, 1975, Milton Koffman and American Transit (using Chromalloy's mailing address) sent a telegram to René Aponte Caratini as acknowledging receipt of the latter's June 30 telegram. They told him that due to critical timing problems in connection with mortgage

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[1] The mortgage expired in January 1976.

foreclosure,[2] and having entered contractual commitments with Posadas de Mexico, they required Aponte to make a $700,000.00 deposit (10% of the purchase price) on or before July 7, and that the closing must be effected before July 31. They also indicated that if the closing was not effected by July 31, they would refund his deposit if Aponte agreed not to delay or impede a prompt foreclosure.

18. On July 7, 1975, Aponte Caratini sent a telegram and letter to the Koffman group and American Transit. He stated the agreement they signed had December 31, 1975 as the closing. He indicated his readiness for closing at an earlier date chosen by mutual consent based on reasonable standards. He stated that he would pay the total sum agreed on or before said date. Aponte pointed out that the agreement estabablished American Transit's obligation to guarantee all mortgagé interest payments throughout the three-year period, and that for such reason the foreclosure was uncalled for.

19. On July 15, 1975, W. S. Walch, in representation of American Transit Corporation, sent a letter to Aponte Caratini to confirm the oral response at recent meetings to the letter and telegram of June 7, 1975. It informed Aponte that the offer to purchase the hotel for $7,000.000.00 was only open until June 30, and required, pursuant to prior telegrams, earnest money deposits and prompt closing arrangements, and that since Aponte had not agreed to either term,[3] the offer was being withdrawn

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[2] See n. 1.

[3] Said terms had not been mentioned in the letters prior to July 1975.

at that time. The letter also indicated that the option contained in the Memorandum of Understanding would remain available under the terms expressed therein and that the same expired on January 5, 1976, and that the price was in excess of $10,000,000.00, and required calculations at the time of closing. It also pointed out that since Aponte rejected the proposal to join in the arrangement with Posadas de Mexico, said proposal was withdrawn and cancelled, leaving as Aponte's only option the purchase of the hotel for an amount in excess of $10,000,000.00, which option was contained in the Memorandum of Understanding. He further stated that Mr. Koffman concurred with this advice.

20. On July 24, 1975, Aponte Caratini sent a letter to American Transit and Burton Koffman. He later sent them a telegram on July 29, 1975. In both he reiterated the position expressed in the June 30 and July 7 letters. He again indicated that a reasonable period should be agreed upon for the closing taking into account the nature of the transaction. Aponte states his readiness to meet with them and set a reasonable date as previously stated.

21. On August 1, 1975, all the defendants executed a Purchase of Notes Agreement. Specifically, said document was signed by Posadas de Puerto Rico, Posadas de América Central, Chromalloy American Corporation, Richard E. Koffman, Burton I. Koffman, and the Tourism Development Company of Puerto Rico. In its item 5.1 the undersigned acknowledge that the Hotel has mortgage liens for $9,500,000.00, and commit themselves to reduce them to $8,000,000.00 as soon as possible. This document states that the owner of the Hotel will be a corporation that on or before September 30, 1975 will be authorized

by the Department of State of the Commonwealth of Puerto Rico to do business in Puerto Rico.

22. Posadas, American Transit Corporation (Chromalloy) and the Koffman group signed a Shareholders Agreement on August 14, 1975. Through this document they agreed to create a Fee Company to operate the hotel. Eventually, the Fee Company was set up through the Partnership Agreement of March 12, 1976. Reference to the Aponte group's participation in this transaction is made in Article IV of the Shareholders Agreement. They agreed that American Transit (Chromalloy) would have 37 1/2% of the equity interest in the Fee Co., the Koffman group 37 1/2% of the shares, and Posadas a 25% share. Item 4.1.2 establishes that any Equity Interest in the Fee Co. provided to the Aponte group would be furnished exclusively from the 75% belonging to Chromalloy and the Koffman group. It also establishes that if the Aponte group should become owners of an equity interest in the Fee Co., it shall agree to be bound to the terms of the agreement. It further establishes that the Aponte Group should waive all option or right to purchase the hotel and casino.

Its Item 4.2 clearly establishes that if the Aponte Group did not reach an agreement with the undersigned, the Koffman Group would promptly cause Empire Life Insurance Co. to proceed with the foreclosure of its first mortgage on the hotel.[4] Further on it authorized the Fee Co. to bid up to $7.5 million at the foreclosure sale and that this amount would be financed on a first mortgage

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[4] See n. 1.

basis by Chromalloy and the Koffman Group. If the bid is less than $7.5 million, the difference between the actual bid price and the $7.5 million to be financed in this transaction would be distributed as follows:

a) the first $500,000.00 would be allocated 50% to Chromalloy and 50% to the Koffman Group.

b) the balance would be allocated according to the participation in the first mortgage under the prior agreement with the Aponte Group; that is, 2/7 for Chromalloy and 5/7 for the Koffman Group.[5]

23. On November 3, 1975, attorney Stanley Walch, in behalf of Chromalloy, sent a letter to Enrique Campos del Toro. The letter's sought to convince Campos del Toro to foreclose his second mortgage. If Campos del Toro should do so, Chromalloy would totally cover said mortgage. Otherwise, he would receive a share of stock in Posadas de Puerto Rico.

On November 20, 1975, the law firm of Ramirez, Segal and Latimer sent a letter to Enrique Campos del Toro advising him that acceptance of the Stanley Walch's proposal could be construed as a collusion with Chromalloy and the Koffman group to eliminate the third mortgagee, Rene Aponte Caratini.

24. Rene Aponte Caratini sent American Transit Corp. a telegram on December 31, 1975 stating that he had found out through the press that American Transit

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[5] We must bear in mind that in the first auction the property was awarded for $150,000.00. The same was annulled by our Honorable Supreme Court.

had reached an agreement with others to operate the Hotel. He proceeds to list his past communications and reiterate his request to set a reasonable date for the closing. He adds that the delays caused by American Transit and its inconsistencies have caused him damages.

25. On behalf of American Transit Corp., Stanley Walch sent Rene Aponte Caratini a reply on January 3, 1976. Said letter repeats that the $7,000,000.00 sales offer for the hotel is not an acceptable alternative due to the numerous financial commitments they had to make with Posadas de Puerto Rico and other companies. He adds that they wish no further negotiations or conversations with Aponte Caratini until he produces concrete evidence of his financial ability to perform.

26. On January 7, 1976, Empire Life Insurance commenced ordinary foreclosure proceedings against Milton Koffman, his wife, and American Transit Corp. in the San Juan Superior Court. Case No. CS 76-40. Paragraph 11 of said complaint reads as follows:

"11. The above-captioned defendants Koffman and American have defaulted in their mortgage obligations because they failed to pay the interest on the same that, as of today, totals eight-hundred and nineteen thousand, eight-hundred and twenty-one dollars and twenty-three cents ($819,821.23) in addition to the fact that the principal was due and demandable, having expired on January 6, 1976, and the same remained unpaid in its totality regardless of plaintiff's claims, forcing plaintiff to declare the debt due and payable."

On January 8, 1976, Milton Koffman and Barbara Koffman appeared, accepting all the allegations in the

foreclosure action brought against them. In the fourth paragraph of their appearance and answer, the Koffmans state: "that they in particular accept that the interest claimed in the complaint is payable and outstanding, as well as the principal, and thus they consent to the foreclosure." They also accept, in the first paragraph, that they had assumed said mortgage.

On January 8, 1976, American Transit Corp. appeared represented by Trent B. Friedman. The fourth paragraph of said appearance states: "we accept in particular that the interest claimed in the complaint is payable and outstanding, as well as the principal on said obligation, whereby they consent to the requested foreclosure." . . . They also accept as true each and every allegation in the foreclosure complaint, including that of having assumed the same.

It arises from the answer to the foreclosure of mortgage complaint filed by the Koffmans and American Transit Corp. that they accept the amount of the mortgage and interest.

27. American Transit closed down the hotel in April or May 1975.

In the light of the foregoing findings of fact, the court draws the following:

III. *CONCLUSIONS OF LAW:*

1. We have previously stated that there are a series of groups involved in this case that we have identified in finding of fact No. 1. The actions and transactions executed by each of these groups are of such nature that they

move us to deem all the natural and/or artificial persons in each group as only one person for purposes of adjudicating rights and obligations. It arises from the documents and the information before us that some appeared in behalf of others and contracted obligations in each other's name. Within their respective groups each one is an "alter ego" of the rest of that group. We thus conclude that between the natural and artificial persons in each group there exists such an identity of interests and property that they merge together (*San Miguel Fertil. Corp. v. P.R. Drydock*, 94 P.R.R. 403 (1967)).

Whether or not we should pierce the corporate veil depends on the specific facts of the case in the light of the general principles of corporate law. It is incumbent upon us to weigh the evidence and draw such finding. (*Fleming v. Toa Alta Develop. Corp.*, 96 P.R.R. 234 (1968); *Cruz v. Ramirez*, 75 P.R.R. 889 (1954).)

A corporation has a personality separate and distinct from that of its stockholders, officers, and affiliates and/or subsidiaries. As a general rule, each of these entities' separate existence can neither be ignored nor overlooked. There are exceptions to this rule. A corporation's acts and obligations can be considered as acts of its individual stockholders, individual officers, and of its affiliates and/or subsidiaries when there concur, among other things, some of the following circumstances:

A. That the corporation not only is influenced and controlled by the same person or persons, but that there is among these persons, or affiliates and/or subsidiaries, such an identity of interests and property that they merge.

B. That the facts are such that to sustain the fiction of two distinct entities, under the particular circumstances of the case, is tantamount to condoning fraud or promoting an injustice.

In the cited circumstances the courts should pierce the corporate veil and deny legal identity to a corporation, as an entity distinct from its affiliates and/or subsidiaries, as well as from its directors or officers who have indistinctively acted in its behalf. (*Swiggett v. Swiggett, Inc.*, 55 P.R.R. 72 (1939); *Heirs of Perez v. Gual*, 76 P.R.R. 898 (1954)). This case provides, at 902-903, n. 3, the following:

"This doctrine, known as 'to pierce the corporate veil,' has been applied, among others, in the following cases:

> "(1) To evade tax payment; (2) where the corporate business is merged with those of the stockholders, as for example, where the stockholders do business without attempting to maintain the corporate business separate from their personal business; (3) to evade the performance of obligations; (4) where the corporation is organized with capital insufficient to answer for its debts; (5) to evade legal provisions. See *Cruz v. Ramirez*, [75 P.R.R. 889]."

Finally, as a corollary to the above, one must acknowledge the merging of two or more corporations and/or individuals, when recognizing such difference results in condoning a default in obligations, fraud, injustice, or defeat of public policy (*Gonzalez v. San Just Corp.*, 101 D.P.R. 168 (1973)). This also happens when recognition of a distinct legal identity perpetuates inequity (*San Miguel Fertil. Corp. v. P.R. Drydock*, 94 P.R.R. 403 (1967)).

In the case at bar, to recognize a distinct legal identity to any or to each of the entities that constitute the different afore cited groups, is contrary to the evidence seen by this court as to the manner in which they conducted business,would encourage default in obligations and injustice, would justify an unfair situation and condone fraud. For such reason, we conclude that there is a total identity between each of the natural and/or artificial persons that are part of the groups mentioned in finding of fact No. 1. Consequently, each one of the members of one of those groups is bound by the actions of the others in their group, and the parties herein are liable for the actions of the others in their group, regardless of whether or not they have been sued.

2. In view of the events which took place, the initial relations between the parties were governed by the deeds executed on January 5, 1973 (deeds Nos. 2 and 3, executed before notary Edward M. Borges) and the Memorandum of Understanding signed that same day. The latter became the binding contract governing their relations at the end of the 60-day term established to reach an agreement. Defendant admits this in his "Motion for summary judgment."

3. In the light of the documents deemed by both parties as authentic, we conclude that codefendants Milton and Barbara Koffman, and American Transit Corp. defaulted on their obligation to pay Empire Life Insurance Co. the seven million dollar principal on the mortgage owed to said corporation. When San Jeronimo Hotel Corp. (Aponte Caratini) sold the property to these persons, they retained seven million dollars from the agreed sales price to pay said mortgage when it matured. Milton

and Barbara Koffman were to pay 70% of the sales price and American Transit Corp. 30%. (See deed No. 3 of January 5, 1973, executed before notary Edward M. Borges, motion A, Exh. 6). They never paid said amount. That is, said codefendants never paid the seven million dollar balance owed from the sales price agreed with the Aponte group.

The obligation assumed by the Koffmans and American Transit to pay said mortgage not only was clearly established in the cited deed but was accepted by both parties in the complaint filed by Empire Life Insurance Co. (See finding of fact No. 26.).

4. American Transit defaulted On its obligation to pay the interests owed by virtue of the mortgage commitment. It assumed said obligation in clause 8 of the Memorandum of Understanding (see Motion A, Exh. 2, p. 5). In its complaint in CS 76-40, Empire Life Insurance Company admitted not having paid the same (see finding of fact No. 26).

5. Such nonperformances brought about the foreclosure of Empire Life Insurance's first mortgage on the hotel. When the first mortgage was foreclosed, Aponte Caratini was deprived of the right to foreclose his two subsequent mortgages for the sums of one million, five hundred thousand dollars and five hundred thousand dollars, respectively. He was also barred from filing claims against the individual debtors, since, as we said above, the agreement was that said mortgages could only be claimed against the hotel property and never against the individual debtors. For such reason, the Koffmans' and American Transit's nonperformance with regard to

payment of the outstanding seven million dollar principal, along with American Transit's failure to pay the agreed interest, deprived Aponte Caratini of the only property which secured payment of his debt. Since by virtue of the cited clause said property was the only one Aponte could collect against, the nonperformance on the part of the Koffmans and American Transit deprived Aponte of a debtor from whom to collect. Had they met their obligations, the hotel would only be responsible for the mortgages owed to Aponte Caratini and the five hundred thousand dollar mortgage owed to Enrique Campos del Toro. The value of the property was more than enough to meet said obligations. It is evident that plaintiff Aponte Caratini has not as of today been able to collect the mortgages which now total two million dollars, plus accrued interest, because codefendants Milton and Barbara Koffman, and American Transit Corporation did not meet their obligations, which obligations they not only assumed with regard to Empire Life Insurance Company, but also with regard to Aponte Caratini.

6. The evidence before us indicates that the reason the cited codefendants did not meet their obligations to pay the principal and interest was the agreement made to bar Aponte Caratini from exercising his rights. As we stated in the findings of fact, all the defendants signed a Shareholders Agreement where they agreed that if a deal could not be reached with the Aponte group they would move for the foreclosure of the first mortgage.

Insofar as pertinent, clause 4.2 provided the following:

> "If, within sixty days after the commencement date an agreement as described in paragraph 4.1 is

> not reached with the Aponte Group, the Koffman Group agrees to promptly cause Empire Life Ins. Co. to proceed to commence foreclosure proceeding pursuant to the first mortgage. . . ."

The only purpose of the foreclosure was to deprive Aponte of his rights. Such privation was fraudulent.

As a rule, fraud is not presumed. This only means that whoever alleges that fraud has been committed must prove it with reasonable certainty so as to satisfy the conscience of the trier. It does not mean that fraud has to be established with conclusive evidence nor with mathematical certainty. (*Carrasquillo v. Lippitt & Simonpietri, Inc.*, 98 P.R.R. 646 (1970); *Garcia Lopez v. Mendez Garcia*, 102 D.P.R. 383 (1974).) In the case at bar, fraud has been duly established through the uncontroverted documents. This fraud is not only evident from a series of documents, and from the defendants' actions, but was expressly agreed. The agreement to fraudulently deprive Aponte of his property was put in writing by all the defendants. In *Garcia Lopez, supra*, the circumstances which moved our Supreme Court to deem that fraud was committed were considerably less consequential than those present in the case at bar.

We could also apply to this case the Supreme Court decision in *Blanco v. Hernandez et al.*, 19 P.R.R. 769, 774 (1913). The court found as indication of fraud, that defendant, known as a tireless and stubborn litigant, allowed a judgment by default against him to prevail without entering any plea whatsoever. In the case at bar, the defendants have shown a tireless tenacity to litigate the case with the aim of preventing Aponte from prevailing in court. This contrasts sharply with their actions in CS

76-40, where they appeared the day after the complaint was filed to accept all the facts alleged and to agree to have judgment rendered against them immediately. (See also, *Santini Fertilizer Corp., Inc.* [*sic*] *v. Diaz*, 62 P.R.R. 114 (1943); *Sheffield Progressive, Inc. v. Kingston Tool Co., Inc.*, 405 N.E.2d 985 (Mass. App. 1980).)

The uncontested documentary evidence establishes that Aponte Caratini was fraudulently deprived of his right to collect the one million, five hundred thousand dollar and five hundred thousand dollar mortgages he had on the hotel ownership. Such fraud was committed through the collusion of all the defendants and through the written agreement signed by them. Such sums had been invested from Aponte Caratini's private funds (see Sworn Statement of Stanley Walch, motion A, Exh. 29; and the Memorandum of Understanding). The Koffmans and American Transit also failed to comply with the obligation they contracted with Aponte Caratini to pay the principal and interest on the first mortgage.

7. As we stated above, the mortgages in favor of Aponte Caratini had a clause limiting the liability to the mortgaged property and exempting the mortgagors from debt liability. Said clause was found valid by our Supreme Court in *Campos del Toro v. Ame. Transit Corp.*, 113 D.P.R. 337 (1982). This clause was litigated *in abstracto* by this court that, through Judge Eugenio Ramos Ortiz, decided to settle its validity prior to any consideration of allegation of fraud, nonperformance of contract, and other issues. Our Supreme Court's decision only adjudicated the validity of the deeded agreement signed by the parties. It neither considered nor ruled on the allegations and evidence of the fraud committed against Aponte

Caratini. Neither did said Court have before its consideration the uncontested documents showing the insidious collusion of defendants, precisely using the deeded mortgage clause in a fraudulent manner, and defaulting on their obligations to Aponte Caratini, depriving him of his rights. The decision of the Hon. Supreme Court does not have the scope of res judicata that the defendants want to attribute to it, that is, to judicially annoint the clear injustice they are trying to commit with plaintiff.

8. The foregoi .g establishes Aponte Caratini's right to recover the value of the mortgage and interest of which he was fraudulently deprived. Since this came about as a result of the agreements and fraudulent actions of all the defendants, the latter are solidarily liable to him. Article 1054 of the Civil Code, 31 L.P.R.A. § 3018, provides:

"Those who in fulfilling their obligations are guilty of fraud, negligence, or delay, and those who in any manner whatsoever act in contravention of the stipulations of the same, shall be subject to indemnify for the losses and damages caused thereby."

We must now determine if Aponte Caratini is entitled to additional sums for damages. For this we must examine other events and agreements reached.

9. In our findings of fact we stated that the Memorandum of Understanding gave Aponte Caratini a purchase option if American Transit did not exercise its option. American Transit did not exercise such option. Therefore, Aponte Caratini's option had full effect. He was fully entitled to exercise such option and, as of January 5, 1973, he had two and a half to three years to exercise the same. If he were to notify his decision to

exercise the option, he had an additional term of six months to do so, computed from the date of notice.

10. In a letter of June 11, 1975, the defendants made Aponte Caratini a sales offer of seven million dollars for the hotel. He was given until June 30 to state his decision. An examination of the evidence leads us to conclude that said offer was a variant of the option given to Aponte in the Memorandum of Understanding. On the one hand the price was reduced, and on the other hand the term to exercise the option was restricted. The basic price was reduced by $40,000.00, plus Aponte would not be required to pay the additional investments made by American Transit. On the other hand, instead of giving Aponte until January 5, 1976 to notify his intent to exercise his option, he had to do so on or before June 30, 1975. Obviously, there were very good reasons to change these terms. The documentary evidence and uncontested facts reveal that the hotel had been closed since May. Defendants American Transit and the Koffman Group wished to decide as soon as possible what to do with the hotel since, as they said, it was necessary to settle this immediately in order to reopen for the coming tourist season.

On June 30, 1975, Aponte Caratini accepted the offer. Thus, the sales contract was perfected. He had six months as of June 30 to close the deal, that is, to pay the price agreed. After the contract was perfected, defendants American Transit and the Koffman Group tried to change the terms agreed. This is unacceptable at law. It was totally unreasonable to have Aponte then make a seven hundred thousand dollar deposit in seven days, and the balance paid and the seven million dollar deal closed on

or before July 31, 1975. Defendants tried to unilaterally change a perfected contract.

When on June 30, 1975, Aponte notified his acceptance of the offer made in the June 11 letter, the contract between the parties was perfected. There concurred the consent of the contracting parties, the subject matter of the contract, and the consideration of the obligation (Art. 1213 of the Civil Code, 31 L.P.R.A. 3391). The consent was shown by the concurrence of the offer and acceptance of the thing and the consideration which constituted the contract. (Art. 1214 of the Civil Code, 31 L.P.R.A. 3401.) The offer was definite, it contained all the essential elements of the contract, so the contract was perfected by the mere acceptance of the offer. The obligation between the parties stemmed from a meeting of minds. (*Prods. Tommy Muniz v. COPAN*, 113 D.P.R. 517 (1982); see, M. Godreau, *La opcion de compra en Puerto Rico*, 53 Rev. Jur. U.P.R. 565.) The contract was perfected through the June 30, 1975 letter. What was pending was consummation of the same. (*Alvarez v. Manzano*, 66 P.R.R. 344 (1946).)

11. Plaintiff [*sic*] argues that actually the offer of June 11, 1975 was a contract offer different from the contract in the Memorandum of Understanding. They could, for such reason, require a seven hundred thousand dollar deposit on July 7, and the balance on July 30, 1975. We do not agree. First, the option to buy contract contained in the Memorandum of Understanding had not been extinguished. Article 1110 of the Civil Code of Puerto Rico (31 L.P.R.A. 3151) establishes the manner by which obligations are extinguished. None of these was present in this case. One could only argue that there was no novation. Such novation did not occur. Article 1158 of

the Civil Code of Puerto Rico (31 L.P.R.A 3242) provides: "In order that an obligation may be extinguished by another which substitutes it, it is necessary that it should be so expressly declared, or that the old and new be incompatible in all points."

In the case at bar, the June 11 letter and the June 30, 1975 acceptance do not indicate the extinguishment of the purchase option in the Memorandum of Understanding. Neither were the new and old obligation incompatible in all points. Hence, we must conclude that what took place was a modification of the Memorandum of Understanding by accord of the parties, modifying thus the price and the term that Aponte Caratini had to motify if he was to exercise his option. While in the original contract he had until January 5, 1976 to notify said decision, now both parties agreed to make such decision on June 30, 1975. Such circumstance is clearly contemplated in our Civil Code which, although it states that there was no novation, and hence extinguishment of the old obligation, it does recognize the parties' authority to modify their agreement. Article 1157 of the Civil Code (31 L.P.R.A. 3241) provides:

> "Obligations may be modified:
>
> 1. By the change of their object or principal conditions.
> 2. By substituting the person of the debtor.
> 3. By subrogating a third person in the rights of the creditor."

What the parties in this case did, as we stated above, was to change some of the conditions established in the original contract. This does not imply a novation. Our

Supreme Court in *Colon & Cia., Inc. v. Registrar*, 88 P.R.R. 77, 80-81 (1963), citing Castan, stated that:

"As to the term, the scientific doctrine seems to understand that the granting of a term to the debtor or the waiver by the debtor of the term initially granted, does not imply, in principle, a novation, for the term, according to Planiol, merely affects the *execution* of the obligation, not its constitution."

Defendants' argument was up against the retaining wall of the doctrine laid down by our Supreme Court that novation is never presumed, but must be established without any trace of doubt. (See: *Warner Lambert Co. v. Tribunal Superior*, 101 D.P.R. 378 (1973); *Caribe Lumber Corp. v. Marrero*, 78 P.R.R. 826 (1955); *Hernandez v. Burgos et al.*, 40 P.R.R. 440 (1930); *G. & J., Inc. v. Dore Rice Mill, Inc.*, 108 D.P.R. 89 (1978); *Miranda Soto v. Mena Ero*, 109 D.P.R. 473 (1980); *E.L.A. v. Urb. Damiro, Inc.*, 112 D.P.R. 244 (1982); *Marina Ind., Inc. v. Brown Boveri Corp.*, 114 D.P.R. 64 (1983).)

Even if we were to accept, for argument's sake, defendants' argument that the June 11, 1975 offer was a contract different from the one in the Memorandum of Understanding, their arguments lack merit. If that were the case, they would not have the right to establish a term unilaterally. If the case were that the term set down in the Memorandum of Understanding was not applicable to said contract, defendants could not set the term. That is the Court's function. Article 1081 of the Civil Code (31 L.P.R.A. 3064) provides:

"Should the obligation not fix a period, but it can be inferred from its nature and circumstances that there was

an intention to grant it to the debtor, the courts shall fix the duration of the same."

The nature and circumstances of the contract in controversy move us to conclude that there was an intent to give the debtor a term. Seven million dollar deals are not closed from one day to the other in these times. The defendants themselves recognized that the term was in effect when on July 1 they required payment of seven hundred thousand dollars on or before July 7, and the balance of the agreed price on or before July 30. The circumstances of this case and the customs and usages in this type of business is that the agreed price is paid in a period of time (*Prieto v. Hull Dobbs Co.*, 88 P.R.R. 407 (1963)). When no fixed term is established, the debtor has a reasonable period to meet his obligation (*De La Haba v. Gay & Co.*, 52 P.R.R. 568 (1938)). That was just what Aponte Caratini once and again requested, that the parties agree on a reasonable term (see motion A, Exh. 5, 9, 10, 12, and 13). It is incumbent upon the courts to fix the term and we may do so during the proceedings to force specific performance of the obligation. (*Diaz Alvarez v. Alvarez Rodriguez*, 98 P.R.R. 114 (1969).)

What should be the reasonable term in this case? In *Diaz Alvarez, supra*, the court used as basis to fix the term the time agreed between the parties to pay the deferred sales price of another property. It was three years. In the case at bar, there are a series of parameters which allow us to pinpoint a reasonable term in which Aponte Caratini could exercise his option if, as defendants allege, the agreement of June 30 was not a variation of the original purchase option. Among these parameters are the following:

a) the agreed sales price was seven million dollars, a substantial amount. In a hearing before this court, defendants' counsel, referring to Aponte Caratini's need in 1972 to finance the purchase of the San Jeronimo Hotel, stated that it was a considerable amount of money, which had to be raised and paid with the help of others.

b) In the Memorandum of Understanding Aponte Caratini committed himself to make a $500,000.00 cash advance. The parties agreed to give him 60 days. According to the defendants' counsel during the hearing, said sum was paid in August, 1973, that is, approximately eight months later.

c) The Memorandum of Understanding gave American Transit 30 months to exercise its option.

d) That same document gave an agreed minimum six-month term and a maximum three-year term to exercise the purchase option. The sum was five million dollars.

e) the same contract gave Aponte Caratini six months at the end of the first two years and a half of the contract to decide if he wished to exercise his option.

f) also, in the same contract Aponte Caratini was given an additional six months from the date of notice of his decision to exercise the option to close the deal.

All these circumstances move us to conclude that the parties acknowledged that such a large sum required a reasonable term to raise the money. We deem that six months was a reasonable term for Aponte Caratini to close the deal.

12. All motions before our consideration were filed under Rule 36 of Civil Procedure. Pursuant to the same, summary judgment should be rendered if the documents and evidence before the Court show that there is no genuine issue regarding the material facts and that, as a question of law, summary judgment should be rendered. There is no controversy between the parties on the above-cited facts. The documents of record have been accepted as authentic by both parties. The genuine issue is the application of the Law. Summary judgment should be rendered in the present case. (*Valcourt Questell v. Superior Court*, 89 P.R.R. 809 (1964); *Padin v. Rossi*, 100 P.R.R. 257 (1971).)

In view of the foregoing findings of fact and conclusions of law, the court renders the following:

IV. *RULING AND JUDGMENT:*

1. We grant the motion for summary judgment filed by codefendants American Transit Corp., Milton Koffman, Barbara Koffman, Empire Life Insurance Co., Posadas de Puerto Rico, S.A., Inc., and Posadas de Puerto Rico Associates, and render partial summary judgment dismissing Rene Aponte Caratini's claim to be recognized as owner of 40% of the equity of the San Jeronimo Hotel. Defendants' motion for summary judgment in all other points and claims is hereby denied.

2. We grant plaintiff Rene Aponte Caratini's motion for summary judgment with regard to the following points:

a) the defendants are hereby ordered to solidarily pay Rene Aponte Caratini the sum of one million, five hundred thousand dollars, plus interest as of January 5, 1976. Said sum is equivalent to that owed to Rene Aponte Caratini for the mortgage note issued in his name and which he was barred from collecting by virtue of the agreements and actions of all the defendants, which resulted in the fraudulent deprivation of Aponte's right to said sum.

b) all defendants must solidarily pay Rene Aponte Caratini the sum of five hundred thousand dollars, with interest at an annual rate of 8% as of January 5, 1976. Said sum is equivalent to that owed to Rene Aponte Caratini for the mortgage note issued in his name and which he was barred from collecting by virtue of the agreements and actions of all the codefendants, which resulted in the fraudulent deprivation of Aponte's right to said sum.

c) partial judgment is rendered finding defendants liabie for damages caused to Rene Aponte Caratini as a result of their nonperformance of obligations arising from the contract held through the letters of June 11 and July 30, 1975, which committed them to sell the San Jeronimo Hotel to Rene Aponte Caratini for the sum of seven million dollars. A hearing is ordered for the presentation of evidence by the parties and for the assessment of damages.

3. Defendants were obstinate in litigating the claims adjudicated in favor of Rene Aponte Caratini. We will timely fix the attorney's fees resulting from such obstinacy.

4. We render this partial summary judgment since no reason exists to stay judgment on the claims settled herein until the final adjudication of this case.

TO BE ENTERED AND NOTIFIED.

GIVEN in San Juan, Puerto Rico, this 30th Day of June, 1988.

(Sgd) JOSE A. ANNONI MATOS
SUPERIOR COURT JUDGE

(SEAL)

APPENDIX F

Campos del Toro *v.* Ame. Transit Corp.

ENRIQUE CAMPOS DEL TORO, Plaintiff and Appellee, *v.* AMERICAN TRANSIT CORP. ET AL, Defendants and Appellants; RENE APONTE CARATINI, Plaintiff and Appellee, *v.* POSADAS DE PUERTO RICO ET AL., Defendants and Appellants.

No. R-81-515. Decided October 20, 1982.

1. MORTGAGES – REAL PROPERTY – CONSTRUCTION – GENERAL RULES OF CONSTRUCTION – CONTRACT CLAUSES – LIMITATION OF LIABILITY.

   A clause in a promissory note and mortgage contract, which limits the liability of the lien, is valid because such agreement is not contrary to the law, morals, or public order.

2. ID. – ID. – ID. – ID. – ID. – ID.

   It was not necessary to apply art. 184 of the 1979 Mortgage Law – which provides that a valid agreement may be reached in the deed constituting a voluntary mortgage, so that the secured obligation may only be effective on the mortgaged property – to limit the personal liability provided therein because there is a strong presence in the Civil Code of the resource of limiting the debtor's liability, complemented by the ample contractual licence of art. 1760 to secure with mortgage all sorts of obligations.

3. CONTRACTS – IN GENERAL – REQUISITES AND VALIDITY – NATURE AND ESSENTIALS – IN GENERAL – IN GENERAL.
Persons may establish covenants, clauses, and conditions which they may deem advisable in their businesses and works, without any barrier to the will's authority other than law, morals, and the public order.

JUDGMENT OF *Eugenio Ramos Ortiz*, Judge (San Juan), which found for plaintiff in a complaint for collection of money and foreclosure of mortgage. *Reversed*.

María del Carmen Taboas and *Francisco De Jesús Schuck* of *Fiddler, González & Rodríquez* for appellants. *López-Lay & Vizcarra* for appellee René Aponte Caratini. *Morán & Rey* for Enrique Campos del Toro.

IN THE SUPREME COURT OF PUERTO RICO

Enrique Campos del Toro,

Plaintiff and appellee

v.

American Transit Corp. *et al.*,

Defendants and appellants

No. R-81-515 Review

René Aponte Caratini,

Plaintiff and appellee

v.

Posadas de Puerto Rico *et al.*,
Defendants and appellants

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, October 20, 1982

We are asked to pass on the right of the mortgagee to try to obtain from the debtor additional property to recover the unpaid balance of the debt, even after agreeing to limit the debtor's liability to the mortgaged real property.

In deed No. 2, executed in San Juan on January 5, 1973, by its president René Aponte Caratini, before notary public Edward M. Borges, San Jerónimo Hotel Corporation executed a mortgage on the real property of the same name operated as a tourist hotel, to secure a promissory note of $7,000,000 principal that Empire Life Insurance Co. had lent to it, to mature on January 5, 1976. Both in the note and in the mortgage, mortgagor and mortgagee agreed that the debtor's liability would be limited to the mortgaged real property, as stated in the following clause:

TWENTY-SIXTH: *Exculpation*

The MORTGAGOR and the MORTGAGEE expressly agree that the Mortage Notes and the Mortgage issued and delivered by the MORTGAGOR to

> the MORTGAGEE and received by the latter with the clear understanding and agreement that the MORTGAGOR shall not ever be personally responsible for the payment of any sum by virtue of having executed, issued and delivered the aforementioned Notes and the Mortgage which guarantees them, or by reason of any breach of any of the terms and conditions to which said Notes and the Mortgage which guarantees them are subject, the MORTGAGOR and the MORTGAGEE having agreed that the rights and obligations of the MORTGAGOR and the MORTGAGEE and of any successor or assignee or any person that by any means might have acquired any title or right to said Notes and Mortgage for any consideration or cause shall be limited to the real property object of this deed and mortgage to guarantee the aforementioned Notes; and the MORTGAGOR shall not be responsible personally for the payment of any sum to any person by virtue of having executed, issued or delivered said Notes and Mortgage.

On that same day, January 5, 1973, San Jerónimo Hotel Corp. sold the hotel to Milton and Barbara Koffman and to American Transit Corp. who, in exchange for considerations, executed and delivered a $500,000 promissory note to their vendor, and the same agreement as to limitation of liability copied above was incorporated into it as well as into the sale and mortgage deed. Said note was assigned to appellee Campos del Toro as payment of a loan he had given to Aponte Caratini when the latter was bidding at the hotel's auction. In a third transaction that same day, appellants Mr. & Mrs. Koffman and American Transit Corp. secured with a mortgage on the same real property a note for $1,500,000 that represented the loan they had taken from Aponte Caratini. The mortgage

deed also contains the aforecited clause 26 that limits the mortgagor's liability to the mortgaged real property.

Then, on August 31, 1973, Koffman and American Transit Corp. signed a third note for $500,000, in favor of Aponte Caratini, which they secured with a mortgage – with limited liability, as the prior ones – on the same building.

Mortgagee Empire Life Insurance Co. foreclosed its $7,000,000 first mortgage at a public sale, and the property was awarded to it; as a result of this, Campos del Toro and Aponte Caratini's subsequent credits were cancelled. Both filed actions to collect their credits, erased from the Property Registry, and the appellant-mortgagors admitted the existence of the notes and their nonpayment, asserting as their only defense the covenant whereby their mortgagee waived the universal patrimonial guarantee of art. 1811 of the Civil Code[1] and accepted that its mortgagors' liability was limited to the mortgaged real property. The trial court held that the agreement limiting the mortgagor's liability is null because it goes against the basic obligation and generic guarantee of art. 1811, and because this type of agreement is allowed only by express legislative authorization, which did not exist at the time the contract was executed,

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[1] Art. 1811. "A debtor is liable for the fulfilment of his obligations with all his present and future property." Article 156 of the 1979 Mortgage Law provides that the mortgage shall not alter the debtor's personal responsibility set down in said art. 1811 of the Civil Code, but expressly eliminates said prohibition by recognizing in its art. 184 the contract limiting liability.

and about which the Legislature had not expressed itself until the Mortgage Law of August 8, 1979 was approved, which provided, in its art. 184:

> *Obligation limited to mortgaged property*
>
> Notwithstanding the provisions in section 2552 of this title, a valid agreement may be reached in the deed constituting a voluntary mortgage, so that the secured obligation may only be effective on the mortgaged property.
>
> In this case, the debtor's liability and the creditor's action shall be limited by virtue of the mortgage loan to the value of the mortgaged property and shall not touch the other assets belonging to the debtor.
>
> When the mortgage thus constituted affects two or more properties, and the value of one of them does not cover that part of the loan it is liable for, the creditor may only claim restitution for the difference against the other mortgaged properties in the manner and with the limitations established in section 2568 of this title. 30 L.P.R.A. § 2603.

Based on this premise, the San Juan Superior Court decided in favor of the subsequent mortgagees and ordered the defendants-appellants to pay principal, interest, and 10% of the debt as attorney's fees. On January 22, 1982, we agreed to review,[2] and after considering the parties' briefs and memoranda, we adjudge.

Article 1811 of the Civil Code has never been an inmovable monolith rooted in contractual autonomy, in

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[2] Since notice of this petition was timely mailed to plaintiffs-appellees, a regulated question that does not affect our jurisdiction, the motion to dismiss the petition to review lacks merit.

search of new ways to moderate the strictness of patrimonial obligations. It must live and temporize with art. 1207 of the Civil Code the source of an ample license to agree as to anything not contrary to law, morals or public order. Appellees limit their attack on the covenant to its violation of the legal order because it lacked an express legislative expression that would make an exception of the rule of the debtor's universal liability. The Civil Code should not be interpreted as a veto to the creditor's kindness. The new art. 184 was not necessary for the agreement reached by these contracting parties; its function is rather one of stating a manner of contracting already allowed in old provisions of the Civil Code to which we will immediately refer.

[1-2] The appellees' position, and that of the trial judge, in pushing for the need for an express statutory authorization so that the agreement on the limitation of personal liability in the mortgage may be considered lawful, dissolves by the mere contact with the basic principle of freedom to enter into contracts set forth in art. 1207 of the Civil Code: "The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order." The agreement to limit liability – accepted by both appellants and by appellee Aponte Caratini, both as Empire Life Insurance Co.'s mortgagor and as Koffman and American Transit Corp.'s mortgagee – is not contrary to law. At the time the agreement was signed, on January 5, 1973, it was legal, pursuant to art. 1760 of the Civil Code: "Contracts of pledge and mortgage may secure all kinds of obligations, either pure or subject to conditions precedent or

subsequent."[3] When we confront Roca Sastre with what he calls the "novelty" of art. 140, which gives shape to the limited liability mortgage and the universal guarantee on the debtor's property which, under art. 1811 of the Civil Code, must answer for the obligations with all present and future property, he tends to agree with Castán and Pérez de Alguer in accepting the agreement as lawful reducing its priority, and recognizing to the new article the modest virtue of eliminating doubts about its feasibility.[4] He points out that the limitation on the patrimonial liability belongs to the area of civil law, that once the possibility of its limitation and the lawfulness of the agreement are admitted, mortgage law should not delve into a problem it considers to be solved. 4-1 Roca Sastre, *Derecho Hipotecario* 397 (7th ed. 1979). The challenged agreement between mortgagor and mortgagee that limits the general guarantee of the law does not need an explicit authorization, if we take into consideration that it is born under the protection of a Civil Code that already authorized the conventional limitations on liability, limiting the creditor's action to certain property and exempting the debtor's remaining patrimony. The following are salient examples of this moderating reserve that is also a legislated exception to the universality of art. 1811: (a) the

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[3] The Civil code provisions governing contracts shall be applicable to the mortgage when it owes its existence to the contract, when it is born from the agreement of the parties. 4 Morell y Terry, *Comentarios a la Legislación Hipotecaria* 186, Madrid, Ed. Reus (2d ed. 1930).

[4] Opinion endorsed by Marín Pérez in his monograph *La Hipoteca de Responsabilidad Limitada*, 178 Rev. Gen. Legislacion y Jurisprudencia 422, 425-426 (1945).

removal of certain property from the debtor's liability by operation of art. 1707 of the civil code, which provides: "A person who, for a good consideration, constitutes an annuity on his property, may dispose, at the time of the execution of the contract, that said annuity shall not be subject to attachments for debts of the annuitant." 31 L.P.R.A. § 4796; (b) the anticipated liquidation of damages in the penal clause authorized by art. 1106 of the Civil Code, in itself the agreement establishing a maximum limit to the amount of compensation to be awarded for breach of obligations; (c) the limitation of the heir's obligation to the benefit of an inventory, as provided by art. 977(1) of the Civil Code, to the payment of debts up to the limits of the inheritance; (d) the homestead exemption, 31 L.P.R.A. §§ 1851-1856; and (e) the exemptions of attachment and garnishment of the property that is essential for the family's subsistence, 32 L.P.R.A. § 1130. As vigorous as may be the inclusion in the Code of the recourse to limit the debtor's liability, complemented by the ample contractual license of art. 1760 to secure with mortgage *all sorts of obligations*,[5] we must inevitably con-

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[5] The same character of autonomy of the contracting parties to design the type of security is emphasized in art. 144 of the 1893 Mortgage Law (now art. 187, 1979 Mortgage Law), which provided:

> "Any act or agreement between the parties tending to modify or destroy the force of a prior mortgage obligation, such as payment, setoff, respite, and agreement or promise not to demand, novation of the original contract, a compromise or settlement, shall not produce any effect against a third person unless it be made a matter of record in the registry by means of a new entry, a total or partial can-

(Continued on following page)

clude that art. 184, which was incorporated into the 1979 Mortgage Law, was not necessary to facilitate the limitation by agreement of the debtor's liability up to the cash value of the property offered and accepted as security. An essential part of the creditor's *ius disponendi* is his freedom to choose his credit's security as regards the value of the real property and the order of preference of his credit. There are, in commerce, imponderable and contingent

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(Continued from previous page)

cellation, or a marginal note, as the case may be." 30 L.P.R.A. § 257.

Regarding the unnecessary character of the express authorization introduced by art. 138 of the Spanish Mortgage Law (equivalent to art. 184, P.R.), Marín Pérez comments: "We think that the legal concept embodied in art. 138 of the Mortgage Law had been admitted already, though not explicitly, by the lawfulness of the prior reform. To become aware of this, we need only analyze the contents of arts. 110 and 144 of the Mortgage Law [the same art. 144 of our 1893 Law] to understand how liability could be limited, as provided by the second paragraph of the new art. 138, *by agreement of the parties.*" Marín Pérez, *op. cit.*, at 456-457.

Roca Sastre develops his opinion until it reaches a categorical level:

> " . . . [S]aid limitation of personal liability may only be admitted by way of a covenant or an agreement to limit liability. With these covenants admitted as legal, we could evidently arrive at the same result even before the reform. But, even if this takes some novelty away from the new rule, it is still useful to avoid doubts, for which reason its formulation should be lauded, particularly having in mind that said limitation is born from the covenant, in contrast with Cuba, where it is obligatory." *La Nueva Ley de Reforma Hipotecaria*, 177 Rev. Gen. de Legislación y Jurisprudencia 257, 320 (1945).

elements that may turn a legal covenant into a bad business deal.

It is an obligatory conclusion, induced by the preexistence in our legal order of the aforementioned rules, that the elimination of the personal action and the mortgagee's waiver or renunciation of the deficit resulting from the foreclosure are not innovations introduced by art. 184 of the 1979 Mortgage Law. And as M. Nin y Abarca sustains, "without the need for the new text, nothing kept the mortgagee from waiving a priori the personal action against its debtor or from condoning a posteriori the remainder of the unpaid amount, giving a receipt for the total amount of the credit, as provided in art. 1872 of the Civil Code [art. 1771, P.R.] for cases where the thing pledged is adjudicated. If we keep in mind the rule of law that says: 'what is not forbidden is understood to be permitted,' we must agree that the second paragraph of art. 138 [art. 184, P.R.] is simply a statement and a reminder." *La Hipoteca de Responsabilidad Limitada*, 20 Revista Crítica de Derecho Inmobiliario 292, 296 (1947).

[3] As a complement to the agreement for a limited-liability mortgage, with sufficient enabling force in the prior Law, we may adduce, in support of its validity, the total absence of prohibition of the same. Referring to the ample scope of the contractual initiative found in the statement of art. 1861 of the Civil Code (art. 1760, P.R.) to the effect that a mortgage may secure all types of obligations, whether pure or conditional, Manresa[6] gives as an

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[6] 12 *Comentarios al Código Civil Español* 538, Madrid, Ed. Reus (6th ed. 1973).

only condition that the obligation be lawful and not forbidden by law. Thus, it summarizes the rule of art. 1207 of the Civil Code, which imposes no barriers to the will's autonomy other than law, morals, and public order, and as long as its conventions adapt to said principle, "[p]ersons may establish covenants, clauses, and conditions which they may deem advisable in their businesses and works. . . ." *Castle Enterprises, Inc.* v. *Registrar*, 87 P.R.R. 738, 743 (1963).

The mortgage, deprived of the generic patrimonial liability as a result of an agreement between the contracting parties, has, for De la Rica Arenal a figure similar to the independent mortgage that, when separated from the personal obligation, stops being accessory and becomes an autonomous artificial person. When the real property is conveyed, either for a valuable consideration or as a result of a foreclosure brought by another mortgagee, the original mortgagor is totally released.[7] For the second mortgagee, swept out of the Registry as a result of the judicial sale of a preferential mortgage, it is completely impossible to exercise a personal action.[8] In the autonomous limited-liability mortgage, the obligation dies when the mortgage is born. Roca Sastre emphasizes, as the concept resulting from the agreement to limit personal liability to the mortgaged real property, a personal debt so closely knit with the mortgage that it becomes a mere accessory thereof (and vice versa), for it follows it wher-

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[7] De la Rica Arenal, *La obligación personal y la responsabilidad real en las nuevas modalidades de hipoteca*, IV Anales de la Academia Matritense del Notariado 281, 304 *et seq.* (1948).

[8] Nin y Abarca, *op. cit.*, at 308.

ever it ends up in the successive conveyances of the mortgaged property. Thus, the personal debt seems to be so diluted or subsumed into the very nature of the lien that the extinguishment of the mortgage resulting from the sale of the encumbered thing, carried out as a result of the foreclosure of mortgage, also causes the extinguishment of the corresponding personal debt, even if the total amount of the secured obligation has not been covered.[9]

The judgment under review will be reversed.

Mr. Chief Justice Trías Monge, Mr. Justice Dávila, and Mr. Justice Torres Rigual took part in this decision by rule of necessity, to make a quorum; Mr. Justice Negrón García and Mr. Justice Rebollo López disqualified themselves.

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[9] IV-1 Roca Sastre, *Derecho Hipotecario* 404-406 (7th ed. 1979).

APPENDIX G

AT THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN SECTION

ENRIQUE CAMPOS DEL TORO	)	CIVIL NO. 77-6840 (808)
Plaintiff	)	RE:
vs.	)	COLLECTION OF MONIES; FORECLOSURE OF MORTGAGE AND DAMAGES
AMERICAN TRANSIT CORPORATION; MILTON KOFFMAN; BARBARA KOFFMAN; EMPIRE LIFE INSURANCE COMPANY; POSADAS DE PUERTO RICO ASSOCIATES, INC.; PUERTO RICO TOURISM COMPANY AND RENE APONTE CARATINI	)	
Defendants	)	

AMENDED COMPLAINT AGAINST CO-PARTIES

TO THE HONORABLE COURT:

COMES NOW plaintiff against co-parties René Aponte Caratini, through its undersigned attorneys and for purposes of updating its complaint against co-parties filed in the above captioned case on January 23, 1978 and of clarifying and reducing those sole facts which are still pending resolution by the Honorable Court, this appearing party submits this Amended Complaint Against the following original co-Parties Milton Koffman, Barbara Koffman, Empire Life Insurance Company, Posadas de Puerto Rico, S.A., Inc., Puerto Rico Tourism Company

and Posadas de Puerto Rico Associates, for which purpose it states, alleges and pleads the following:

1. On or around December 1972, being plaintiff against co-parties René Aponte Caratini the owner of one hundred percent of the shares of San Jerónimo Hotel Corporation, a corporation which acquired by public auction the right to buy the Hotel known at that time as "San Jernónimo", which today is known as Condado Holiday Inn, the second mortgage creditor Amron Credit Corporation, on its own and Mr. Milton Koffman, co-defendant and defendant against co-parties herein, who was known as "The Koffman Group", and who also was a shareholder of the aforementioned Amron Credit Corporation, entered into joint conversations with American Transit Corporation, another of the defendants against co-parties for the purpose of acquiring, financing and operating the aforementioned hotel and in turn defending its respective interests in said property.

2. As a result of said conversations the appearing party and the aforementioned defendants against co-party, American Transit Corporation and Milton Koffman, under the name of "The Koffman Group" and the aforementioned Amron Credit Corporation executed a document called "Memorandum of Understanding" dated January 5, 1973.

3. Pursuant to the aforementioned "Memorandum of Understanding" defendants against co-parties assumed towards the appearing party, among others, the following obligations:

I– To acquire the property of the aforementioned hotel in the following proportions:

Koffman Group – 70%

American Transit – 30%

II– To obtain and facilitate to San Jerónimo Hotel Corporation the amount of SEVEN MILLION DOLLARS ($7,000,000.00) so as to exercise the right to purchase by auction the aforementioned hotel and acquire title over same. Said amount was obtained from Empire Life Insurance Company, a corporation which was then, and by information which we believe to be true, still continues at present to be under the direct or indirect control of the "Koffman Group".

III– Constitute a mortgage over the aforementioned hotel for the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) in favor of San Jerónimo Hotel Corporation.

IV– Constitute a mortgage over the aforementioned hotel for the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00) and FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) respectively in favor of the appearing party in recognition of and as guarantee for the payment of monies paid by René Aponte Caratini in relation to the aforementioned hotel.

V– Guarantee the interests of the mortgages mentioned in paragraphs III and IV above, plus interests over the amount of SEVEN MILLION DOLLARS ($7,000,000.00) referred to in paragraph II above.

VI– Establish a one hundred percent option to purchase ownership of the hotel by American Transit Corporation with an obligation on its part to transfer to

the appearing party forty percent (40%) of the above mentioned ownership.

VII– American Transit Corporation would operate, through one of its subsidiaries, Helio Hotel Corporation, the aforementioned hotel for an uninterrupted period of three years from the date of the aforementioned agreement, assuming said subsidiary the responsibility of paying the existing financing expenses, as well as the operating expenses of the hotel as a first class hotel.

VIII– To establish an option to purchase one hundred percent of the ownership of the hotel by the appearing party René Aponte Caratini for SEVEN MILLION FOUR HUNDRED THOUSAND DOLLARS ($7,400,000.00), plus the reimbursement of certain expenses.

4. On the other hand, this appearing party agreed in the aforementioned "Memorandum of Understanding" to transfer the ownership of the "San Jerónimo Hotel" to "American Transit Corporation" and to the "Koffman Group" for a period of three years.

5. During the effective term of the aforementioned "Memorandum of Understanding" and before the expiration of the three year term, defendant against co-party American Transit Corporation on April 8, 1975 formally notified the herein appearing party of its determination not to exercise its right to option referred to in paragraph VI of allegation 3.

6. On June 11, 1975, Burton I. Koffman, under the name "Koffman Group" and American Transit Corporation, made an offer to purchase the property of the afore-

mentioned hotel to the herein appearing party through the payment of the balance of the principal of the first mortgage existing in favor of defendant against co-party Empire Life Insurance Company for the amount of SEVEN MILLION DOLLARS ($7,000,000.00). On June 30, 1975, this appearing party accepted said offer requesting only the establishment of a reasonable amount of time for the closing.

7. In violation to what was agreed in the "Memorandum of Understanding", as stated in allegation 3, defendants against co-party breached same in the following manner:

I– By common agreement, on or around May 1975, they abstained from timely paying the interests corresponding to the first mortgage of SEVEN MILLION DOLLARS ($7,000,000.00), thus violating the obligations of the deed of mortgage, thereby deliberately causing a reason for foreclosing said mortgage. This situation was for the purpose of creating a possible foreclosure to eliminate the then subsequent creditors, plaintiff Enrique Campos del Toro and the appearing party herein.

II– By common agreement, defendants against co-parties Milton and Barbara Koffman and "American Transit Corporation", through their parent corporation "Chromalloy American Corporation", agreed to sell the hotel to "Posadas de Puerto Rico, Associates" viabilizing the operation through the consent and cooperation of the also defendant against co-party Tourism Develópment Company of Puerto Rico. Through this scheme they would prevent the appearing party from obtaining the forty percent of the ownership of said property to which

he was entitled to and they also created and executed a way to eliminate the then subsequent creditors, Mr. Enrique Campos del Toro and the appearing party.

III– During the month of May, 1975 they ceased operating the hotel and closed it.

IV– On or around June 1975, and while the hotel was closed, American Transit Corporation and "The Koffman Group" proposed to the appearing party that he resign to his credit of ONE MILLION FIVE HUNDRED DOLLARS ($1,500,000.00) to facilitate the sale to Posadas de Méjico, under threat of foreclosing the mortgage in favor of Empire Life Insurance Company within the term of one month.

8. Likewise, after accepting the offer referred to in allegation 6 of the complaint against co-parties, defendants against co-party conspired to not viabilize or carry out the acquisition of the aforementioned hotel by this appearing party, despite his repeated efforts to achieve the closing.

9. In order to eliminate the aforementioned Enrique Campos del Toro and this appearing party, defendant against co-party Empire Life Insurance Company, conspiring with and following instructions from defendants against co-party, the titleholders of the hotel, Milton Koffman and Barbara Koffman, who directly or indirectly controlled said corporation and also in common agreement with the other co-owner of the hotel American Transit Corporation established a complaint for foreclosure of mortgage on January 7, 1976, case 76-77 of this Honorable Court, which complaint was accepted by defendants the following day after the complaint was

filed, requesting that judgment be issued and that it be final and binding as of the date of its issuance. Judgment was issued pursuant to the allegations on January 26, 1976 and as a result thereof and after an accelerated proceeding, the aforementioned plaintiff Empire Life Insurance Company became the owner by public auction of the aforementioned hotel, paying only the ridiculous amount of ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00). Said hotel was sold for the amount of SEVEN MILLION FIVE HUNDRED THOUSAND DOLLARS ($7,500,000.00) to Posadas de Puerto Rico Associates on September 10, 1976, pursuant to deed number 18 of Protocolization before Notary Juan F. Esteves, clarified and modified by deed number 30 of December 26, 1978 before the aforementioned notary, which entity is also controlled by co-defendants and defendants against co-party Koffman and American Transit Corporation.

10. Said co-defendants against co-party should be ordered to comply with the provisions of the "Memorandum of Understanding" dated January 5, 1973, and as a result thereof transfer to this appearing party forty percent (40%) of the ownership of the hotel subject to this controversy. And also pay this appearing party the amount of TWO MILLION DOLLARS ($2,000,000.00) plus interests on the promissory notes referred to in paragraph IV of clause 3 of the complaint against co-party.

11. Defendants against co-party's actions have caused the herein appearing party damages which are estimated in an amount of not less than ONE MILLION DOLLARS ($1,000,000.00).

12. In the alternative defendants against co-party should pay this appearing party, solidarily, as indemnity all the amounts which it would have been entitled to receive pursuant to the aforementioned "Memorandum of Understanding", an amount equivalent to 40% of the value of the aforementioned hotel, which amount is estimated to be not less than FIVE MILLION DOLLARS ($5,000,000.00), plus an amount of not less than ONE MILLION DOLLARS ($1,000,000.00) for damages and the total amount of the two aforementioned promissory notes plus interests, which amount to not less than TWO MILLION FIVE HUNDRED THOUSAND DOLLARS ($2,500,000.00).

WHEREFORE, it is very respectfully requested of this Honorable Court that pursuant to the applicable legal proceedings, it GRANT this Complaint against Co-Party and as a result thereof condemn co-defendants against co-party to:

a) Transfer to the appearing party herein forty per cent (40%) of the ownership of the hotel subject to this controversy; and

b) Pay the herein appearing party the amount of TWO MILLION DOLLARS ($2,000,000.00) plus the corresponding interest on the promissory notes;

c) Pay this appearing party an amount of not less than ONE MILLION DOLLARS ($1,000,000.00) as compensation for damages suffered; or

d) In the alternative, pay the herein appearing party in a solidary manner as indemnity, all the amounts it would have been entitled to receive pursuant to the

"Memorandum of Understanding", that is, an amount equal to forty per cent (40%) of the value of the aforementioned hotel, which amount is estimated in not less than FIVE MILLION DOLLARS ($5,000,000.00), plus an amount of not less than ONE MILLION DOLLARS ($1,000,000.00) for damages suffered and TWO MILLION DOLLARS ($2,000,000.00), plus its corresponding interests on the above mentioned two promissory notes, plus the costs, expenses and attorneys fees agreed upon, with all other pronouncements which this Honorable Court may deem applicable.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY: That on this same date I have delivered a true and exact copy of this Amended Complaint against Co-Parties to Attorney María del Carmen Taboas.

In San Juan, Puerto Rico, December 21, 1984.

LOPEZ-LAY & VIZCARRA-
407 Parque Condominium
Fourth Floor
Santurce, Puerto Rico 00912
725-5300

By: CARLOS A. LOPEZ-LAY

CERTIFIED TO BE A CORRECT TRANSLATION MADE AND/OR SUBMITTED BY THE INTERESTED PARTY /s/ Evelyn Hansen Todd EVELYN HANSEN TODD, CERTIFIED INTERPRETER ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT.

APPENDIX H

GENERAL COURT OF JUSTICE
SUPERIOR COURT
SAN JUAN SECTION

ENRIQUE CAMPOS DEL TORO Co-Plaintiff vs. AMERICAN TRANSIT CORPORATION, et. als., Co-Defendants	)	CIVIL NO. 77-6840 (808) 77-712 COLLECTION OF MONEY, ETC.

* * *

MOTION REQUESTING
PARTIAL SUMMARY JUDGMENT

Comes now plaintiff René Aponte Caratini represented by his undersigned attorneys and respectfully requests that a partial summary judgment be entered in his favor for the following reasons:

1. According to the document entitled "Memorandum of Understanding", whose validity has been accepted by both parties (see exhibit 11 of the moving party) René Aponte Caratini was recognized, among others, the following rights:

a) A credit for the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS without interest.

b) A credit for the sum of FIVE HUNDRED THOUSAND DOLLARS with interest.

c) The right to be recognized a 40% ownership in the hotel sold if American Transit Corporation, or one of

its subsidiaries or affiliates, acquired the hotel in question.

d) An option to acquire the hotel for the sum of SEVEN MILLION FORTY THOUSAND DOLLARS plus other expenses established if American Transit did not exercise its option.

e) The right that American Transit operate the hotel as a first class establishment for the three years following the date of the "Memorandum of Understanding".

f) The right that American Transit pay the interest (the debt servicing) during the term of three years from the date of the "Memorandum of Understanding".

Such rights appear from the document which we have referred to previously, which has been accepted by all the parties, wherefore no controversy exists about the existence of those rights in favor of Aponte Caratini.

2. That it appears from the record of this case and from the allegations of the parties that there is no controversy as to the fact that the credit for ONE MILLION FIVE HUNDRED THOUSAND DOLLARS as well as the credit for FIVE HUNDRED THOUSAND DOLLARS, secured by the mortgage, recognized in favor of Aponte Caratini were never paid.

3. That it also appears from the record of the case and the documents submitted that no controversy exists among the parties in the sense René Aponte Caratini was never recognized the 40% of ownership in the hotel which the agreement referred to.

4. That on June 11, 1975 American Transit and Milton Koffman sent a letter to René Aponte Caratini offering to sell the hotel for the sum of SEVEN MILLION. Said offer constituted a variation to the option to purchase granted to Aponte Caratini in the "Memorandum of Understanding" dated January 5, 1973. (See letter dated June 11, 1975, exhibit 8 of the moving party). René Aponte Caratini sent a telegram on June 30, 1975 and a letter of that same date accepting the offer made in the June 11, 1975 letter, whereby said offer became a contract between the parties which changed the "Memorandum of Understanding" (see exhibits 9 and 10 of the moving party).

5. That American Transit, in violation of the agreement contained in the Memorandum of Understanding of January 5, 1973 closed the hotel on May 1975, when the agreed term of three years it had agreed to, had still not expired (see exhibit 29 of the moving party, sworn statement from Mr. W. Stanley Walch, page 7, number 21).

6. That American Transit did not pay the interest owed to Empire Insurance Company as it had agreed to in the "Memorandum of Understanding" (see exhibit 3 of the moving party).

7. That all the moving parties of the motion through an agreement of August 14, 1975 conspired to deprive René Aponte Caratini of all his rights under the "Memorandum of Understanding" fraudulently agreeing to provoke the foreclosure of the mortgage held by Empire Insurance Company over the property subject to the contract (see specifically a document entitled "Shareholders Agreement", exhibit 10 of the appearing party, and in

detail Article IV of said agreement; the same appears ad verbatim on pages 11 and following of this writ).

8. That through the document entitled "Shareholders Agreement" which we have previously referred to, all the moving parties of the motion for summary judgment, specifically American Transit Corporation, agreed to sell to themselves, using Sociedad Posadas de Puerto Rico Associates of the Hotel San Jerónimo as a subterfuge in violation of the rights of René Aponte Caratini and by means of the use of the fraudulent proceeding of the foreclosure of mortgage. Said behavior constituted a means to subvert all of René Aponte Caratini's rights, specifically the right to be recognized as the owner of 40% of the property.

9. The pertinent statements made in the preceding Opposition to Motion Requesting Partial Summary Judgment are reproduced and made to form part of this Request for Summary Judgment.

10. That all the facts previously stated appearing from documents whose validity is not in controversy, partial summary judgment should be entered finding that the facts previously stated are not in controversy among the parties, that through the fraudulent and illegal actions of American Transit Corporation, Milton Koffman, Barbara Koffman, Empire Life Insurance Company, Posadas de Puerto Rico, S.A., Inc., Posadas de Puerto Rico Associates, and the other co-defendants in this case, René Aponte Caratini was illegally deprived of his rights under the "Memorandum of Understanding" executed on January 5, 1973, as it was subsequently amended, and that therefore his right to compensation for the damages

suffered as a result of such actions should be declared, and since no reason exists not to enter a partial summary judgment at this time the same should be entered and, in due time, a hearing should be scheduled to determine the sums that René Aponte Caratini should be compensated, as well as all the other remedies that he should be granted.

Rule 36.3 of the Civil Procedure states in its pertinent part:

> ". . . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions offered, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a mater of law. A summary judgment, interlocutory in character, may be rendered on any issue between the parties which can be separated from the remaining issues. Such judgment may be rendered for or against either party to the action."

It is an established principle that when from existing statements in the record it appears that no real controversy exists as to any material fact and that as a matter of law a summary judgment should be issued in favor of the party requesting same, it should be entered (Valcourt Questell v. Tribunal Superior, 89 D.P.R. 827; Cortés Piñeiro v. Sucesión Cortés, 83 D.P.R. 685).

The documents and allegations contained in the present motion show that the motion for partial summary judgment filed by the moving party should not be granted because it has no right to same and on the contrary, partial summary judgment should be entered in favor of René Aponte Caratini as previously stated.

WHEREFORE, it is respectfully requested from the Honorable Court that it enter the partial summary judgment requested by René Aponte Caratini and deny the one requested by the other parties in the present case.

I HEREBY CERTIFY: That copy of the present writing has been sent to Maria del Carmen Taboas, Esq., Fiddler, Gonzalez y Rodriguez, G.P.O., Box 3507, San Juan, Puerto Rico 00936.

In Aibonito, Puerto Rico, September 18, 1987.

JULIO EDUARDO TORRES
JENARO MARCHAND
Attorneys for René Aponte Caratini
Box 1387
Aibonito, Puerto Rico 00609
Tels. 765-7666 and 735-7600

BY: (signed)
JULIO EDUARDO TORRES

CERTIFIED TO BE A CORRECT TRANSLATION MADE AND OR SUBMITTED BY THE INTERESTED PARTY.
/s/ Evelyn Hansen-Todd
EVELYN HANSEN TODD CERTIFIED INTERPRETER ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT.

GENERAL COURT OF JUSTICE
SUPERIOR COURT
SAN JUAN SECTION

ENRIQUE CAMPOS DEL TORO	)	
	)	CIVIL NO. 77-6840 (808)
Co-Plaintiff	)	77-712
	)	
vs.	)	
	)	COLLECTION OF
AMERICAN TRANSIT CORPORATION, et. als.,	)	MONEY, ETC.
	)	
Co-Defendants	)	
	)	

A P P E N D I X

DOCUMENT	EXHIBIT
1. Complaint Case Empire Life Insurance Company v. Milton Koffman, Barbara Koffman and American Transit Corp., No. 76-67.	1
2. Appearance and Answer of Milton Koffman and Barbara Koffman in case 76-67.	2
3. Appearance and Answer of American Transit Corp. in case 76-67.	3
4. Complaint Enrique Campos del Toro v. American Transit Corp. et. als., 77-6840.	4
5. Answer to Complaint, complaint against co-parties and other matters of René Aponte Caratini, 77-6840.	5
6. Minute dated Jnuary 9, 1979.	6
7. Judgment dated October 23, 1981.	7

APPENDIX I

GENERAL COURT OF JUSTICE
SUPERIOR COURT
SAN JUAN SECTION

ENRIQUE CAMPOS DEL TORO Co-Plaintiff vs. AMERICAN TRANSIT CORPORATION, et. als., Co-Defendants	)	CIVIL NO. 77-6840 (808) 77-712 RE: COLLECTION OF MONEY, ETC.

SWORN STATEMENT

I, René Aponte Caratini, under oath state:

1. That my name is as stated, I am of legal age, single, attorney and engineer and resident of San Juan, Puerto Rico.

2. That on January 5, 1973 I signed, together with other persons, corporations and groups, the document called "Memorandum of Understanding" related to the property, operation, administration and other matters of Hotel San Jerónimo, located in the Condado area, San Juan, Puerto Rico, and which presently operates under the name of Condado Plaza Hotel and Casino. Said document was submitted by the petitioner of the motion requesting partial summary judgment as Exhibit II.

3. That as provided in clause 4 of said "Memorandum of Understanding" I loaned the amount of $500,000.00 dallares referred to in same:

4. That the 40% ownership in the hotel if American Transit acquired same was never recognized. See paragraph 6, page 4 of the "Memorandum of Understanding".

5. That on the same January 5, 1973, I executed together with Milton Koffman and Barbara Koffman and American Transit Corporation public deed number three of Sale, Mortgage and Assumption of Mortgage before Notary Edward M. Borges. In said deed it is stated that purchasers withheld the amount of SEVEN MILLION DOLLARS to pay the balance of the mortgage encumbering the property sold. The amount withheld by the purchasers was the one corresponding to that owed to Empire Life Insurance Company. The deed which I am referring to is Exhibit 6 of petitioner's Motion for Summary Judgment.

6. That American Transit operated the Hotel San Jerónimo until May 1975 through its subsidiary Helio Hotel. The hotel was closed without my consenting to this. American Transit had obligated itself to operate the hotel as a first class hotel during three years as of January 5, 1975.

7. That I received notice from American Transit Corporation through a letter of April 9, 1975, informing me that it was not going to exercise the option recognized by the "Memorandum of Understanding" which I have referred to above. It was indicated in said letter that I had until December 31, 1975 to exercise my option to purchase the hotel, but required that I indicate my intention as soon as possible.

8. That after communications and meetings around June 1975 I was made an offer to participate in a transaction with the Posadas de Mexico Group. I was also made an offer to acquire the hotel for the total amount of SEVEN MILLION DOLLARS. Said offer was a variation of the option contained in the "Memorandum of Understanding". On one hand the price was reduced, but on the other I was asked to give my decision on or before June 30, 1975. On that date I notified my acceptance of the offer to sell.

On July 1, 1975, Koffman and American Transit sent me a telegram. The same was an attempt to change the offer that had been accepted by me. It contained proposals of conditions which were totally unacceptable and clearly unattainable, reasonably, within the financial community and the tourism industry.

I was not aware that the other parties who were talking with me had the purpose of using the first mortgage to fraudulently deprive me of my rights. Therefore, despite the fact that the agreement contemplated a closing on December 31, 1975, I informed them that I was ready to do so on the nearest date to be established by mutual agreement and based on reasonable standards. I informed them that on or before that date I would pay the total amount of the price agreed to. Since again an attempt was made to change the price I stated that I would review the list of inventory and property that they were sending me and would inform them of my position.

I received a letter from Mr. W. Walch of American Transit Corporation dated July 14, 1975. It now indicated

that their offer was only valid until June 30, 1975. Through said letter they alleged to be withdrawing same.

I again addressed the Koffman Group and American Transit on July 24 and 29, 1975. I reaffirmed my above stated position. I told them that a reasonable time should be agreed to for the closing, taking into consideration the nature of the transaction. I reaffirmed my availability to meet to establish a reasonable date for said closing.

I received a letter dated July 24, 1975 from Mr. Burton Koffman wherein he stated that the agreement with Posadas was an alternate plan, but that I would not be detained from exercising my rights.

While I negotiated this case with the other parties, I did so in good faith. I was never at that time aware of the agreement to fraudulently deprive me of my rights and of the rights of Mr. Enrique Campos del Toro. Subsequently the document called "Shareholders Agreement" came to my attention whereby several of the other parties in this case agreed to use the mortgage owed by them to Empire Life Insurance Company to deprive me of my rights. Said agreement clearly appears from clauses 4.1., 4.2 and 5.2 of said document called "Note Purchase Agreement" signed on August 1, 1975 by Posadas de Puerto Rico, S.A., Posadas de América Central, S.A., Chromalloy de American Corporation, Messrs. Richard Koffman and Burton Koffman and Compañía de Fomento Turístico de Puerto Rico.

Subsequently I also became aware of the proposal made through letter of November 3, 1975 from Mr. W. Stanley Walsh to Mr. Enrique Campos del Toro. Said proposal was so that Mr. Campos del Toro would foreclose his $500,000.00 mortgage, depriving me in said

manner of all my rights, including that of collecting my mortgages for TWO MILLION DOLLARS. I also became aware that Mr. Campos del Toro rejected said offer after being counselled by his attorneys, who indicated that said proposal constituted a collusion on his part with the Chromalloy and Koffman Groups to deprive me of my rights pursuant to the "Memorandum of Understanding" and other rights.

9. That at present I have not received any of the payments which I was entitled to pursuant to the Memorandum of Understanding, nor have I received any consideration whatsoever in payment of any of the rights for which I was deprived by the other participants in this transaction.

IN WITNESS WHEREOF, I swear and sign this statement at Aibonito, Puerto Rico, September 10, 1987.

(signature illegible)
RENE APONTE CARATINI

Affidavit No. 1321

Sworn and subscribed to before me by René Aponte Càratini, of the above stated personal circumstances, whom I give faith I personally know at Aibonito, Puerto Rico, September 18, 1987.

(signature illegible)
NOTARY PUBLIC

CERTIFIED TO BE A CORRECT TRANSLATION MADE AND OR SUBMITTED BY THE INTERESTED PARTY.
/s/ Evelyn Hansen-Todd
EVELYN HANSEN TODD CERTIFIED INTERPRETER ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT.

APPENDIX J

STATE OF MISSOURI

ROY D. BLUNT, Secretary of State

(SEAL)

To all to Whom these Presents shall Come:

I, ROY D. BLUNT, Secretary of State of the State of Missouri, which office is an office of record having a seal, certify that

HEIDI A. KLEES

by whom the foregoing or annexed document was notarized, was, at the time of the notarization of the same, a Notary Public authorized by the laws of this state to act in this State and to notarize the within SWORN STATEMENT

and I further certify that the Notary's signature on the document is genuine to the best of my knowledge, information and belief and that such notarization was executed in accordance with the laws of this State.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of my office. Done at the City of Jefferson, this 26th day of May, 1987.

/s/ Roy D. Blunt
Secretary of State

(SEAL)

IN THE SUPERIOR COURT OF PUERTO RICO
COURT OF SAN JUAN

ENRIQUE CAMPOS DEL TORO, Plaintiff,	)	
v.	)	Civil No. 77-6840
AMERICAN TRANSIT CORP., et al. Defendants.	)	
STATE OF MISSOURI	)	
	)	SS.
CITY OF ST. LOUIS	)	

SWORN STATEMENT

I, W. Stanley Walch, of legal age, married, attorney-at-law and a resident of the State of Missouri, under oath declare:

(1) Since approximately 1969 to May 1, 1976, I was Executive Vice President and General Counsel of Chromalloy American Corporation ("Chromalloy"). During the same period I was also an officer of its subsidiary, American Transit Corp. ("American Transit").

(2) On May 1, 1976, I went into private practice and ever since that date I have been, and still am, outside counsel for Chromalloy and American Transit.

(3) Chromalloy was at all relevant times a diversified, publicly-owned corporation with shares listed on the New York Stock Exchange. It owned more than one hundred (100) subsidiary corporations when the negotiations described herein took place. In 1973 Chromalloy's

diversified manufacturing and service businesses included hotel management.

(4) I was personally and actively involved in the negotiations that led to the acquisition by American Transit and Mr. and Mrs. Milton Koffman of the then known San Jeronimo Hotel, (the "Hotel"), that took place in San Juan, Puerto Rico on January 5, 1973. The Hotel was bought from San Jeronimo Hotel Corporation, as evidenced by the "Deed of Sale, Mortgage and Assumption of Mortgage", dated January 5, 1973, Deed Number Three before Notary Public Edward M. Borges.

(5) Subsequently I was actively involved in all the relevant transactions that led to the foreclosure of the $7,000,000, first mortgage held by Empire Life Insurance Company ("Empire Life"). The mortgage was foreclosed in the case of *Empire Life Insurance Co. v. Milton Koffman, American Transit Corporation, et al.*, Civil No. 76-67, Superior Court, San Juan.

(6) Thereafter, I was also involved in the sale of the Hotel to Posadas de Puerto Rico Associates and I continued to be involved or familiar with relevant transactions relating to the Hotel, subsequent to said sale.

(7) In December, 1972, shortly before New Year's Day, several representatives of Chromalloy were invited to come to Puerto Rico for the purpose of investigating Chromalloy's or its subsidiaries' interest in managing and/or purchasing the Hotel. At that time Chromalloy, through one of its fifty percent (50%) owned subsidiaries known as Helio Hotels Corp., was beginning an expansion in the hotel industry, an industry in which it and its

subsidiaries had limited previous or significant experience.

(8) Early in January, 1973, three other representatives of Chromalloy (Messrs. Frank P. Nykiel, Joseph Friedman and Harold Koplar) and I came to San Juan and met with Mr. Milton and Mr. Rene Aponte. The Koffman family described herein were not affiliated with Chromalloy in any way and we did not even become acquainted with them until we met for the first time in January, 1973, in San Juan.

(9) Mr. Rene Aponte was the sole owner of San Jeronimo Hotel Corporation. In 1972, Mr. Rene Aponte ("Aponte"), through San Jeronimo Hotel Corporation, was the successful bidder of the fee ownership of the Hotel in a foreclosure proceeding initiated by The Chase Manhattan Bank, N.A. then pending in the United States District Court for the District of Puerto Rico. Under the terms of the foreclosure sale, $500,000 was deposited by San Jeronimo Hotel Corporation to secure the total bid of $7,500,000 until closing. The bid also required San Jeronimo Hotel Corporation to raise the remaining $7,000,000 by January 5, 1973, in order to close the sale. If the money was not raised, the $500,000 deposit was forfeited.

(10) As mentioned in paragraph 8 above, Chromalloy's representatives were invited to Puerto Rico for the purpose of investigating Chromalloy's and/or its subsidiaries' interest in managing and/or purchasing the Hotel. All agreements had to be closed by January 5, 1973.

(11) Mr. Milton Koffman, acting for one of his family's corporations, Empire Life Insurance Company,

agreed to make a loan secured by a first mortgage in the amount of $7,000,000 provided another financially responsible company was willing to make a participation investment of at least $2,000,000 in the first mortgage loan and assume the full risk of managing the Hotel.

(12) Chromalloy and American Transit ultimately agreed to take part in the transaction. During the negotiations which lead to their agreement, Chromalloy's and American Transit's representatives, Frank Nykiel and myself, made it clear that their Helio Hotels Corp. subsidiary was only willing to run the risk of managing the Hotel for a maximum period of three (3) years and then only if American Transit was granted an option to buy 100% of the Hotel. If the Hotel's operations during the three year period were successful and if American Transit opted to buy 100% of the Hotel, American Transit agreed to grant Aponte a forty percent (40%) minority interest in the Hotel at that time. Mr. Nykiel and I also insisted, during the negotiations, and as a condition of taking the risk, that American Transit immediately acquire a thirty percent (30%) interest in the ownership of the Hotel subject to all prior mortgages. The thirty percent (30%) interest was to be acquired by Chromalloy's American Transit subsidiary because it owned fifty percent (50%) of the stock of Helio Hotels Corp., the proposed manager of the Hotel. Subsequently, in September, 1973, American Transit acquired 100% of the stock of Helio Hotels Corp. In addition, Chromalloy, through one of its leasing and financing subsidiaries, agreed to purchase a $2,000,000 participation in the first mortgage loan of $7,000,000 which, as explained, Empire Life had agreed to extend to

enable San Jeronimo Hotel Corporation, Aponte's corporation, to exercise and close the foreclosure bid by January 5, 1973.

(13) Mr. Milton Koffman further conditioned Empire Life's commitment to grant the first mortgage in the amount of $7,000,000 on a simultaneous transfer of seventy percent (70%) of the Hotel's fee to himself and his wife, Mrs. Barbara Koffman, subject to American Transit's and Aponte's options to purchase as outlined in the Memorandum of Understanding and all prior mortgages.

(14) During these negotiations, Aponte was present and accepted all of the foregoing conditions. He requested and was granted the option outlined in the Memorandum of Understanding to purchase the Hotel if American Transit elected not to exercise its prior option. He was also advised and accepted the fact that Empire Life was one of the companies owned by the Koffman family.

(15) During the negotiations it was further agreed that San Jeronimo Hotel Corporation was to be given a mortgage note in the amount of $500,000 guaranteed by a second mortgage on the Hotel. The note represented the bid deposit made at the foreclosure sale by San Jeronimo Hotel Corporation and it was to be immediately assigned to Mr. Campos del Toro.

(16) Due to the fact that Aponte represented that he had forfeited $1.5 million dollars before 1973 in previous bids that were subsequently lost or had otherwise invested $1.5 million dollars in the Hotel, it was agreed during the negotiations that Aponte would be given a

non-interest bearing mortgage note in the amount of $1.5 million dollars secured by a third mortgage against the Hotel.

(17) It was finally agreed with Aponte that when a $500,000 tax or deposit refund he was owed was actually received by him, he would invest said funds in the Hotel. In turn, Mr. Milton Koffman, his wife and American Transit agreed upon receipt to execute a mortgage note in the amount of $500,000 secured by a fourth mortgage on the Hotel.

(18) As part of the agreements, it was understood that none of the parties to the transactions, nor their affiliates, would ever have personal liability for the funds represented by the $7,000,000 note, the $500,000 note, the $1,500,000 note, nor the $500,000 note to be given to Aponte when the funds were invested by him. This agreement was specifically described in all the deeds of mortgage, all the mortgage notes and the "Memorandum of Understanding."

(19) Since time was very short, on January 5, 1973, I hurriedly prepared and the parties executed a "Memorandum of Understanding" setting out the essential terms of our agreement. Due to the fact that I dictated the "Memorandum of Understanding" working with a secretary who had limited knowledge of the English language, and I have no Spanish skills, the "Memorandum of Understanding" was a very rough document which had to be corrected in handwriting and initialled extensively in order to meet the 12:00 midnight closing deadline, which we barely accomplished. The "Memorandum of Understanding" does, however, accurately reflect the

terms of the transaction and a true copy of the same is attached to the "Motion Requesting Partial Summary Judgment", to which this statement is annexed.

(20) On January 5, 1973, when the "Memorandum of Understanding" was executed, the Hotel was being operated by the Tourism Development Company and had become quite deteriorated. Substantial capital and maintenance improvements and refurbishing expenses were required. These turned out to cost in excess of $3,000,000, most of which was invested by Chromalloy through Helio Hotels Corp., its subsidiary mentioned above.

(21) Shortly after the execution of the "Memorandum of Understanding" Chromalloy's subsidiary, Helio Hotels Corp., undertook the management of the Hotel and continued to operate it until the Hotel was closed in May, 1975. During that period of time the Hotel sustained substantial operating losses in excess of $9,000,000, which was a financial threat even to a company as large as Chromalloy.

(22) In addition to the $9,000,000 in operating losses sustained from approximately February, 1973 through May, 1975, Chromalloy through Helio Hotels Corp. invested in excess of $2,500,000 in permanent capital improvements such as air conditioning, boilers, roof painting, refurbishing and the like. The remainder of the refurbishing costs were funded by the proceeds of the fourth mortgage described in paragraph 17 above.

(23) Before April 8, 1975, I advised Rene Aponte that American Transit would not be exercising its option contained in the "Memorandum of Understanding" to purchase the Hotel because of the devastating losses that

had been sustained. I also advised Aponte that the Hotel would be closed in the near future to avoid further losses.

(24) On April 8, 1975, a letter was sent to Aponte by American Transit wherein, among other things, he was formally advised of American Transit's decision not to exercise its option to buy the Hotel contained in the "Memorandum of Understanding."

(25) In the April 8, 1975 letter, Aponte was also advised that he could exercise his purchase option under the terms set forth in the "Memorandum of Understanding." As explained in the referenced letter, the option price for Aponte, per the terms of the "Memorandum of Understanding", was $10,091,659 in cash, plus accrued interest on $2,640,207 from April 30, 1975 through the date of closing. Aponte never questioned the accuracy of this option price calculation nor did he ever attempt in any way to exercise his option under the "Memorandum of Understanding."

(26) In 1975, American Transit and Mr. Burton Koffman, another member of the Koffman family, entered into negotiations with a potential purchaser/manager of the Hotel named Posadas de Mexico. Posadas de Mexico is an unaffiliated company, owned by an experienced hotel operator and manager in Dallas, named Jack Pratt.

(27) Aponte was continually advised of these negotiations with Jack Pratt by Mr. Burton Koffman and me. He was given several opportunities to exchange his third and fourth mortgages against the Hotel for an equity interest in the company that was being organized by Posadas and Pratt to acquire the fee interest in the Hotel

following either foreclosure of Empire Life's first mortgage or a voluntary transfer of title by all parties in interest.

(28) On June 4, 1975, Aponte, Burton Koffman, and I met at Mr. Koffman's office in New York City. During the meeting Aponte was appraised of the proposed terms of the financing required to reopen the Hotel under Posadas de Mexico's management and the negotiations with Jack Pratt. At that time Aponte was given his first opportunity to acquire an equity interest in the new company Pratt and Posadas were organizing to acquire the Hotel. Additionally, during the meeting Mr. Koffman and I, acting for American Transit, offered Aponte the opportunity to buy the Hotel by repaying the $7,000,000 first mortgage if he could close the sale by June 30, 1975, and make a substantial earnest money deposit. This offer was not contemplated in the "Memorandum of Understanding." Nevertheless, it was discussed as another alternative to the situation then present. In fact, Aponte's option purchase price under the "Memorandum of Understanding" was, as evidenced in paragraph 25 of this Sworn Statement, more than $10,000,000 not $7,000,000.

(29) On June 11, 1975, I forwarded a letter to Aponte outlining portions of our prior conversation in New York City. Therein I requested his decision on which alternative he would agree to by June 30, 1975.

(30) On June 30, 1975, Aponte sent a telegram stating that he wanted to purchase the Hotel for $7,000,000.

(31) As evidenced by American Transit's telegram to Aponte dated July 1, 1975, a deposit of $700,000 – ten percent (10%) of the purchase price – on or before July 7,

1975, was required from Aponte to keep the offer open. Aponte was also give another month to close and was notified in writing that final closing of the $7,000,000 sale must be effected by July 31, 1975.

(32) On July 7, 1975, instead of the $700,000 earnest money deposit Aponte sent another telegram which did not refer to the earnest money deposit or set a closing date.

(33) On July 11, 1975, I participated in a meeting in San Juan, Puerto Rico among Aponte, Mr. Enrique Campos del Toro, Burton Koffman and other representatives of Chromalloy and the Tourism Development Company of Puerto Rico. In this meeting Aponte acknowledged that he did not have $7,000,000, but requested until December 31, 1975 to attempt to raise $7,000,000. Because negotiations with Posadas de Mexico and Pratt were ongoing and had to be consummated in order to enable the Hotel to be re-opened for the 1975 winter season, Mr. Koffman and I told Aponte that it was not possible to renew the offer to sell the Hotel to him for $7,000,000, which had expired on July 7, 1975. Nevertheless, we did again offer Aponte the opportunity to acquire an equity participation in the new Posadas company that was being organized. We also gave Mr. Enrique Campos del Toro and Aponte drafts of the proposed Shareholders Agreement related to the proposed ownership and management arrangements for the Hotel after it was acquired by the new Posadas company. Notwithstanding, Aponte ultimately rejected this proposal.

(34) On July 15, 1975, I wrote Aponte confirming our conversations in San Juan and answered his July 7,

1975, telegram. This letter, again, repeated very clearly that the offer to sell for $7,000,000 was closed. Nevertheless, the letter also made clear that Aponte's option to buy the Hotel as per the terms of the "Memorandum of Understanding" was still available to him. The referenced letter again advised to Aponte that the purchase price under the "Memorandum of Understanding" exceeded $10,000,000 in cash.

(35) Aponte never responded directly to this letter. However, at the end of July, specifically the 29th, he sent yet another telegraph indicating that he was accepting the $7,000,000 offer which had been discussed in New York in June and had been formally rejected and withdrawn orally and in writing as previously evidenced. Once again on December 31, 1975, Aponte sent another telegraph indicating, again without any earnest money deposit or closing date, that he was accepting the long ago rejected and withdrawn $7,000,000 proposal.

(36) On January 3, 1976, I responded to Aponte's December 31, 1975, telegram and again advised him that the $7,000,000 proposal had long ago been rejected and withdrawn and that his option pursuant to in the "Memorandum of Understanding" would expire on January 5, 1976.

(37) Aponte never responded to my letter of January 3, 1976, nor to my knowledge have any other representatives of Chromalloy, American Transit or the Koffman family ever had any negotiations with Aponte subsequent to that date.

(38) On January 7, 1976, two days after Empire Life's first mortgage matured and became payable in full,

Empire Life instituted foreclosure proceedings in San Juan. The foreclosure was not finally accomplished until October, 1978, at which time Empire Life bid the first mortgage in for approximately the full principal amount of its $7,000,000 note.

(39) At the foreclosure sale in October, 1978, which Aponte and I attended, he had an opportunity to bid. Although the Hotel was sold for about $7,000,000 at that sale, Aponte did not submit a bid.

(40) Following the foreclosure sale, Empire Life subsequently sold the fee interest in the Hotel to Posadas de Puerto Rico Associates, the partnership that was organized by Posadas de Mexico and Jack Pratt to acquire the fee interest of the Hotel. Posadas de Puerto Rico Associates is the successor entity to the company Posadas and Pratt were organizing in 1975 to acquire the Hotel. If Aponte had accepted the equity participation offers Burton Koffman and I made in 1975, he would have become a part owner of Posadas de Puerto Rico Associates. I subsequently have learned that in 1984 or thereabouts, Posadas de Puerto Rico Associates sold the fee interest in the Hotel to an affiliate of Williams Electronics Corp. However, I did not participate in that transaction and have no personal knowledge of the details thereof.

(41) In addition to the foregoing, American Transit did in fact pay all of the interest which it had agreed in the "Memorandum of Understanding" to pay until December 31, 1975, on the second mortgage of $500,000 and on the fourth mortgage of $500,000. As outlined in the Memorandum of Understanding, those mortgage notes were held, respectively, by Mr. Enrique Campos del

Toro and Aponte and, as stated, they received all interest due thereon. Under the terms of the Memorandum of the Understanding, no interest was due or payable on the third mortgage note held by Aponte.

In St. Louis, Missouri, this 22nd day of May, 1987

/s/ W. STANLEY WALCH
W. Stanley Walch

Subscribed and sworn before me, a Notary Public, by W. Stanley Walch, of the above referred personal circumstances, to me personally, the 22nd day of May, 1987.

HEIDI A. KLEES

MY COMMISSION EXPIRES:
HEIDI A. KLEES
NOTARY PUBLIC,
STATE OF MISSOURI
MY COMMISSION EXPIRES
MAY 12, 1989
ST. LOUIS COUNTY